

## Leveson Inquiry Report Calls for New System of Press Regulation in United Kingdom

On Nov. 29, 2012, Lord Justice Brian Leveson released his 1,987-page report of findings and recommendations stemming from his 17-month inquiry into the culture, practices, and ethics of the United Kingdom press. The report, among other things, recommends a new system of press regulation that would be mandated by a parliamentary statute. The report and recommendations are drawing concern from free press advocates who fear the changes suggested would be detrimental to the UK's 300-year old tradition of broad press freedom. But those who have been frustrated and outraged because of the British media's actions in recent years argue the recommendations do not go far enough to curb the unethical behavior of the press or to provide redress for victims.

The Leveson Inquiry began in November 2011, prompted by the British "phone hacking" scandal. The practice of phone hacking — illegally accessing the voicemail of famous or prominent subjects of coverage — had been known since 2006, but public and political outrage grew after an investigation by the *Guardian* revealed that the *News of the World* accessed the voice mail of Milly Dowler, a 13-year-old girl who went missing in 2002 and was later found murdered. *News of the World*, owned by Rupert Murdoch's News International, closed its doors in July 2011 amid the scandal and a number of its previous editors, reporters, and investigators face criminal charges. (For more on the phone hacking scandal, see "Update: Charges Filed in British Phone Hacking Cases" in the Summer 2012 issue of the *Silha Bulletin*, "Not Just a 'Rogue Reporter': 'Phone Hacking' Scandal Spreads Far and Wide" in the Summer 2011 issue, and "Murdoch-owned British Paper Embroiled in Phone Scandal" in the Fall 2009 issue.)

### **Report Calls for New British Press Regulation Entity with Statutory Backing**

In his public remarks on release of the report, Lord Justice Leveson said the evidence of the inquiry showed that "on too many occasions" the press' responsibility to democracy and to the public interest, as well as the Editors' Code written and enforced by the press, "have simply been ignored." Therefore, Leveson recommended a new press regulatory body entirely independent from the press that includes "an effective system of self-regulation of standards, with obligations to the public interest." This body would replace the Press Complaints Commission (PCC), the current self-regulatory body of the press, which was criticized after it reported that the practice of phone hacking was not widespread. The PCC is a voluntary body for British print publications that is made up of representative of the major publishers. It is funded by its member newspapers and magazines and has no legal authority.

The regulatory body proposed in the Leveson report would not include any current newspaper editors, current Members of Parliament (MPs), or members of government. Retired editors and journalists, however, would be eligible to be members. The Standards Code Committee would be responsible for drafting a new standards code, and its breach could result in a fine of up to £1m, or about \$1.5 million, to the publication. As with the PCC, individuals could complain to the new body at no cost. Beyond fines, other potential sanctions would include mandated publication of a correction or an apology. Lord Leveson's proposals also include an attempt to lower litigation costs by suggesting a new arbitration service that would offer an alternative to settle a dispute. The arbitration service would only be open to use by organizations who were members of the new regulatory body.

To ensure the proper functioning of a new regulatory system, Leveson also recommended that the new body be accompanied by a "statutory underpinning," meaning that legislation would be passed by Parliament to make sure the body remained independent and effective. "... I have recommended legislation that underpins the independent self-organized regulatory system and facilitates its recognition in legal processes. ... This is not, and cannot be characterized as, regulation of the press," the report said. In a November 29 story summarizing the report, the BBC said this legislation would "enshrine, for the first time, a legal duty of government to protect freedom of the press." The executive summary and the Leveson Report in its entirety are available at <http://www.levesoninquiry.org.uk/>.

The proposed "statutory underpinning" now being referred to as the "press law" is drawing concern from the industry and dividing politicians. British Prime Minister David Cameron told national newspaper editors at a December 4 meeting that in order to avoid introduction of a new press law by the government, they must implement all of the Leveson report recommendations, according a *Guardian* story the same day. Editors of the *Daily Telegraph*, the *Sun*, the *Daily Mirror*, the *Guardian* and *The Times* (of London) were among those present at the meeting. The most notable absence, the *Guardian* reported, was Paul Dacre, the editor-in-chief of the *Daily Mail*, who was unable to attend because of a funeral. After speaking, Cameron turned over the meeting to his culture secretary, Maria Miller, and Oliver Letwin, the Cabinet Officer Minister, whom the *Guardian* called Cameron's "policy fixer." Letwin has been tasked with dealing with the legal aspects of implementing Leveson's recommendations, the story said. Letwin's address to editors echoed that of Cameron and said, except for

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## SILHA CENTER STAFF

**JANE E. KIRTLEY**

SILHA CENTER DIRECTOR AND SILHA PROFESSOR OF MEDIA ETHICS AND LAW

**HOLLY MILLER**

SILHA *BULLETIN* EDITOR

**CASSIE BATCHELDER**

SILHA RESEARCH ASSISTANT

**EMILY MAWER**

SILHA RESEARCH ASSISTANT

**ELAINE HARGROVE**

SILHA CENTER STAFF

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the statute, the report must be implemented “line by line.” Editors expressed some concern about third parties lodging complaints with the ultimate aim of influencing news agendas, but otherwise, the *Guardian* reported that there was minimal dissent at the meeting.

According to a December 5 BBC report, UK news editors were understood to have approved of 40 of the 47 proposals made in the Leveson Report, including the proposed regulatory body with the power to impose monetary fines. A memorandum sent to editors by former *Mail on Sunday* editor, Peter Wright, distributed to other news editors prior to the meeting, indicated concerns with the

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structure of a Standards Code Committee and who would ratify changes to an Editors’ Code, third-party complaints, pre-publication advice, and the protection of confidential sources. A copy of the editors’

memo with notations of what editors found acceptable and not acceptable about each of Leveson’s proposals is available at <http://www.guardian.co.uk/media/interactive/2012/dec/05/leveson-inquiry-newspapers>.

Most of the newspaper editors publicly opposed the proposed statutory component, but were optimistic that the rest of Leveson’s recommendations could be implemented. The *Mirror’s* Editor-in-Chief Lloyd Embley wrote on Twitter following the meeting that “there is a firm belief that papers can deliver Leveson principles far more quickly without legislation – better for public and free speech.” The *Guardian* said there were “many good things about Leveson’s ideas” and the *Daily Express* said Cameron’s “challenge to the newspaper industry to devise its own regulatory system that complies fully with the tough principles set out by Lord Leveson, delivers fair play and yet does not require legislation is therefore one we are happy to take up. The task is an urgent one.” A compilation of reactions from UK media is available on the BBC’s website at <http://www.bbc.co.uk/news/uk-20546397>.

Other organizations also support change to the current press regulatory body. Article 19, an international press freedom advocacy group, agreed “effective self-regulation is the best way to ensure a truly independent and diverse press” in a November 29 press release. “The fact that self-regulation did not work does not mean that it cannot work,” Agnes Callamard, executive director of Article 19 said in the release. “The PCC clearly failed to do its job properly but a system of meaningful self-regulation that ensures accountability and protects the rights of individuals is not a lost cause.” However, the organization expressed concern over any UK statute that would require self-regulation. Callamard said that although international law does not prohibit such a statute, history has shown statutory regulation in the press often results in abuse of these laws by government to “selectively control what newspapers and other periodicals may say.”

But not all of the British press was on board to praise even a part of the Leveson Report. London-based magazine *The Economist* published one of the harshest critiques of the report in a December 8 opinion piece, calling parts of the report “a scissors-and-paste job culled from Wikipedia.” The commentary said Leveson focused too much on tabloid journalism and “showed less interest in serious journalism, even though his rulings will affect all papers.” Like many critics of the report, *The Economist* pointed out the lack of discussion in the report about new technology and argued that a government cannot impose standards on writing as it imposes standards on other professions like doctors or architects. “Every tweeter, blogger and author of a Facebook post is a reporter of sorts.” The piece advocated that Parliament wait before taking any action to introduce a press law and argued that the current criminal prosecutions of “once-mighty journalists” is likely to change tabloid press behavior.

But other critics argue that self-regulation of the press is not enough to keep the media accountable. Hacked Off, an advocacy group campaigning for tougher press regulation, called any reform without statutory backing a “charade,” according to a December 6 *Guardian* story. At a press conference organized by the group on the same day, Natalie Fenton, a professor of media and communications at Goldsmiths University, said unless the new body is recognized by law “everything else is pointless,” the story said. Hacked Off is also hosting an online petition on its website that individuals can sign in support of Leveson’s recommendations,

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including the press law. The group has the support of many victims of “press intrusion” and had collected more than 141,000 signatures as of December 5, according to a BBC report the same day.

Sheila Hollins, a baroness and a cross-bench peer in the House of Lords, also spoke out in support of the recommended press law. Her daughter, Abigail Witchalls, received a great deal of press attention in 2005 when she was paralyzed after being stabbed in the neck, according to the December 6 *Guardian* report. Hollins told the *Guardian* her family had been harassed by the press for five years and that many reports were not “accurate or ethical,” including a story in *News of the World* that said her daughter was pregnant at the time of the stabbing. “I just don’t think there is a place for the sensationalism to which my family and daughter were subjected,” Hollins said. “I would support something in law to verify that the future press regulator is actually fit for purpose. I do not believe that this can be left entirely to the owners of newspapers.”

J.K. Rowling, the author of the Harry Potter series of books, said she felt “duped and angry” at Prime Minister Cameron’s rejection of the statutory underpinning of a new press regulatory body. “If the prime minister did not wish to change the regulatory system even to the moderate, balanced and proportionate extent proposed by Lord Leveson, I am at a loss to understand why so much public money has been spent and why so many people have been asked to relive extremely painful episodes on the stand in front of millions,” she told the *Guardian* for a November 30 report.

### **Political Leaders Split Over Leveson Statutory Recommendation**

Political leaders are split over Leveson’s recommendation that a new self-regulatory system be backed by a parliamentary statute. The statutory provision is supported by members of the opposition Labour party and left-of-center Liberal Democrats, but also numerous Conservatives, *The New York Times* reported on November 29. Supporters argue the statutory underpinning would give the new body “real teeth,” the *Times* story said. But opponents, including Conservative Prime Minister Cameron, said this type of legislation would be headed down the pathway of state-sanctioned press controls, and reverse a tradition of a free press

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in the UK dating back to the abandonment of newspaper licensing in 1695. “I’m proud of the fact that we have managed to last for hundreds of years in this country without statutory regulation and if we can continue with that, we should.” Cameron said regarding the report.

But Labour party MPs released a six-clause draft bill that would give the Lord Chief Justice the authority to certify the effectiveness of the self-regulation of the newspaper industry every three years, according to a December 9 *Guardian* story. Further, the draft bill also proposes (1) that the press regulatory body, to be named the Press Standards Trust, be recognized by the Lord Chief Justice if a substantial majority of newspapers are members and (2) incentives are provided for newspapers to join this trust through lower levels of high court damages and costs. The bill also suggests the judiciary use the following criteria to examine whether the regulatory body is carrying out its proper function: (1) composition of the body; (2) the body’s investigation of complaints; and (3) the body’s publication of a code that includes guidance on the definition of “public interest.” The bill also includes a provision to “guarantee the freedom and independence of the media,” as the Leveson Report suggested, and requires ministers and government agents to protect press freedom. The full-text of the draft bill is available online at <http://www.guardian.co.uk/media/interactive/2012/dec/10/press-freedom-and-trust-bill-draft>.

In what the *Guardian* characterized as a “significant switch,” the Labour party did not propose that Ofcom, the government entity in charge of broadcast regulation, act as the body to oversee the new press regulation body. The Leveson Report proposed that Ofcom be the government entity involved, and Labour party leader Ed Milliband had initially said the party supported acceptance of the proposals in their entirety. “The debate showed a preference for something other than Ofcom to act as the recognizer, so we have responded to that,” Shadow Culture Secretary Harriet Hartman (MP-Labour) said. “If there is greater comfort with the judges due to their independence from the executive that is fine. It is not tablets of stone. It is an effort to facilitate the talks.” (The Shadow Culture Secretary is the deputy leader of the party in opposition in Parliament.)

The release of the draft was supported by Liberal Democrats, which indicates there may be a majority in the House of Commons to pass a statutory provision, the story said. But Conservatives dismissed the plans “as lacking in detail,” according to a December 10 *Independent* report. The party planned to release its own proposal regarding press reform, with Cameron in agreement, in time for cross-party talks on December 13, the *Independent* reported, but Oliver Letwin continued to discuss an evolving Conservative plan through December 20.

Letwin, on behalf of Prime Minister Cameron, proposed a royal charter to establish a body that will verify whether the new press regulatory body is compliant with the Leveson report, a December 20 *Guardian* story said. A royal charter is a type of formal document that dates back to before a constitutional monarchy and Parliament were introduced in the UK. They have been used to establish cities, universities, and the BBC, among other entities. In a meeting with Hacked Off, Letwin also suggested that a bill may also be introduced in Parliament that would require a “super majority” (up to two-thirds) vote in the Lords and Commons to change the royal charter, the *Guardian* reported. During talks of proposals, Cameron himself also indicated the possibility of a statutory underpinning to bolster the charter, despite his early declarations that he was not in support of a press statute. Normally, royal charters can be amended by ministers, using the power of the monarch through the Privy Council. (The Privy Council is a body that advises the Sovereign of the United Kingdom, in this case, Queen Elizabeth II. It is mostly made up of current or former senior politicians of either the House of Commons or the House of Lords.)

The Labour party appeared “willing to explore the proposal” as long as there is some form of a statute that guarantees that the royal charter could not be amended by the executive, the *Guardian* reported. The Liberal Democrats support a statute requiring that two-thirds of MPs agree to any changes to a royal charter that would oversee the new regulatory body. But the press reacted to the proposed charter with more nervousness, the December 20 *Guardian* report said. At a press briefing the same day, Lord Hunt, chairman of the PCC, said he thought the royal charter “can be a way through, but only if it doesn’t seek to interfere with anything other than a verification of the

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**Joel Simon**  
Executive Director,  
Committee to Protect Journalists

independence of the overall structure.” Newspaper owners and editors plan to meet with leading politicians on Jan. 10, 2013 to discuss the latest proposals for press regulation, according to a December 21 *Guardian* story. Ed Milliband is calling for a solution to be reached by the end of January.

Commentators have had mixed reactions to the political discussion surrounding the implementation of the Leveson recommendations. In a November 30 column for the *Guardian*, former *Times* (of London) editor Simon Jenkins commented on the “bizarre” agreement by Cameron to allow the drafting of a press law after publicly disagreeing with any statutory underpinning to a new self-regulatory body. Jenkins characterized this as “huge gamble,” in which failure could mark the beginning of the end of press freedom in Britain.

Joan Smith, a columnist, critic and novelist who regularly contributes to BBC radio, gave testimony during the inquiry, articulating less concern over what she characterized as a “minimal statutory underpinning” suggested by Leveson in a December 2 column for the *Independent*. “If, as I expect, the report is eventually approved by Parliament, I suspect we will look back and wonder what all the fuss was about,” she wrote. Smith said she found Leveson’s proposals to be cautions and to balance freedom of the press and individuals’ right to redress harm. “The reason this matters is that the public and victims of press intrusion want the same thing: a better press, with stronger public interest defenses.”

#### ***Inquiry Finds no Widespread Corruption of Police by the Press***

The Metropolitan Police Service (MPS), commonly referred to as Scotland Yard, which has jurisdiction over Greater London and also has significant responsibilities such as leading counter-terrorism efforts and protection of the British Royal Family and senior figures of government, was also a focus of the Leveson Inquiry. MPS was criticized for its failure to notify potential phone hacking victims and for too-close relationships between senior police officers and News International executives. But

Leveson said in his report that he did not see “any evidence that corruption by the press is a widespread problem in the police.” Leveson acknowledged in the report that the relationship between senior officials of MPS and News International executives could understandably have been perceived as too close, but that he saw “no basis for challenging at any stage the integrity of the police, or that of the senior police officers concerned.” The perception, he said, came from “poor decisions” that were “poorly executed.” The report, however, did recommend the creation of “consistent national standards and guidance” regarding corruption and “enhanced training and awareness.” The proposal did not include any additional statutory or regulatory tools to deal with corruption, and Leveson noted the criminal penalties in place were enough to deal with this problem.

### **Report Warns Relationships Between Politicians and the Press Have Been Too Close**

In the Leveson Report’s conclusions and recommendations chapter, the Lord Justice said in his view, “the evidence clearly demonstrates that the political parties of UK national government and UK official opposition have had or developed too close of a relationship with the press.” Leveson advocated in the report that there be greater transparency of meetings between the press and politicians. However, the report did not go as far as to list specific relationships of concern.

The inquiry, did, however, specifically examine the relationship between Rupert Murdoch and British politicians, including Prime Minister David Cameron. The report dismissed the allegations that Cameron and Murdoch made a “deal” to trade election support for Cameron’s Conservative Party in 2010 for policies favoring Murdoch’s media businesses, including Murdoch’s \$12 billion bid to take control of British Sky Broadcasting. The bid failed as the phone hacking scandal developed and Cameron and Murdoch denied any such trade-off existed between the two.

But commentators have said that Murdoch’s “power nurtured a deep-rooted reflex, in successive governments and in the police, to curry his favor and to turn a blind eye to his editors’ excesses,” *The New York Times* reported on November 29. In response to these assertions the report said, “Sometimes the greatest power is exercised without having to ask. Just as Mr. Murdoch’s editors knew the basic ground rules, so did the politicians. The language of trades and deals is far too crude in this context. In their discussions with him, politicians knew that the prize was personal and political support in his mass-circulation newspapers.” According to *The New York Times*, Cameron emphasized what he called his “exoneration” speaking to the House of Commons after the release of the report. “We have had to listen to allegation after allegation, conspiracy after conspiracy, smear after smear,” Cameron said, referring to actions by the Labour party. “And each one has been put to bed comprehensively.”

### **Leveson Calls Press Behavior “Outrageous” at Times**

Leveson said in the conclusion of his report that “the clearest message” that comes out of this inquiry addressing the culture, practices, and ethics of the press, is that “time and time again, there have been serious and uncorrected failures within parts of the national press that may have stretched from the criminal to the indefensibly unethical, from pass off fiction as fact to paying lip service to accuracy.” Because of the press’ ability to exercise “unaccountable power,” Leveson said the “status quo is simply not an option” and “the need for change in internal but most importantly in external regulation has been powerfully identified.” Beyond the phone hacking scandal, Leveson pointed to the press’ prioritizing of sensational stories despite the harm they may cause and the pursuit of stories that rose to the level of harassment. Although Leveson noted in his report that the “British press serves the public very well for most of the time,” he argued the

problems his inquiry identified are “[un]likely to be eliminated by self-control.”

### **U.S. Newspapers Critical of Leveson Report as Viewed Through a First Amendment Lens**

Director of the Silha Center and Silha Professor of Media Ethics and Law Jane Kirtley said in her Director’s Note for the Summer 2012 issue of the Bulletin that “from a First Amendment-based perspective, the Leveson Inquiry seems bizarre.” The launch of “a government inquiry into improper relationships between the press and those in power with the intention of defining what constitutes journalism ‘in the public interest’ seems risky,” Kirtley

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wrote. Press freedom groups and U.S.-based newspapers shared similar sentiments after the release of the report. The Murdoch-owned *Wall Street Journal* (*WSJ*) ran a highly critical November 29 commentary about Leveson’s proposals. “Judge Leveson calls for statutory press regulation that insists isn’t statutory regulation. It goes downhill from there.” The commentary went on to criticize what it characterized as a “non-voluntary voluntary self-regulation” body, noting that non-member print publications would be exposed to “exemplary” damages in civil cases against them and that Leveson said he would make it more difficult for these entities to recover costs even if they prevailed in court. The *WSJ* concluded by stating that “Not everything [the British press] published is admirable; some of it may be inexcusable. But that is for readers, advertisers and, when laws are broken, for the courts to judge.” Press freedom, the commentary argued, “is crucial to keeping Britain free.”

*The New York Times* also opposed statutory press regulation in its November 29 editorial “Press Freedom at Risk.” “Press independence is an essential bulwark of political liberty in Britain as it is everywhere. That independence should not, and need not be infringed upon now.” The *Times* argued many of the issues presented in the report — illegal hacking into voice mails or illegally obtaining medical records — are not a protected part of the newsgathering process and can be dealt with through criminal prosecutions. Issues of bribery and corrupt relations with politicians and police could also be dealt with through the criminal laws already in place, the *Times* editorial said. Civil and criminal remedies, the *Times* posited, are the best way of holding newspapers accountable, not government regulation.

The New York-based press freedom watchdog, the Committee to Protect Journalists (CPJ), also issued a statement on November 29 expressing concern over Leveson’s recommendation to adopt statutory regulation of the press. “A media regulatory body anchored by statute cannot be described as voluntary,” CPJ Executive Director Joel Simon said. “Moreover, adopting a statutory regulation would undermine press freedom in the UK and give legitimacy to governments around the world that routinely silence journalists through such controls.”

— HOLLY MILLER  
SILHA BULLETIN EDITOR

# U.S. Supreme Court to Hear Challenge to Citizens-Only Limitations on Virginia Open Records Requests

In October 2012, the Supreme Court of the United States agreed to hear a challenge to a Virginia law limiting open records requests to state citizens in *McBurney v. Young*. Open records advocates and news organizations have called for the Supreme Court to invalidate a

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provision that limits access to state documents to Virginia citizens, following a decision from the U.S. Court of Appeals (4th Cir.), which upheld the law as constitutional in February. Meanwhile, the Obama administration has largely failed to deliver on its promise of a more transparent government, keeping more records secret than the previous administration under the federal Freedom of Information Act. Both the citizens-only provision of the Virginia law and the lack of compliance with federal records requests have raised disclosure concerns among open government advocates.

The federal Freedom of Information Act (FOIA) requires the release of federal documents following a request unless the information falls under one of nine exemptions, which include information classified to protect national security, information that would invade an individual's personal privacy, and information that is barred from disclosure by another federal law. Each state also has its own open records laws to govern the release of state documents. Virginia's law, the Virginia Freedom of Information Act (VFOIA), limits records requests to citizens of Virginia and news outlets that circulate or broadcast in Virginia. VA Code Ann. § 2.2-3700. The full text of the law is available online at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-3700>.

The challenge to the Virginia law arose after the plaintiffs, a Rhode Island and a California citizen who were denied Virginia records under the Act, filed a lawsuit alleging that the law violates the Privileges and Immunities Clause of the U.S. Constitution, U.S. Const. art. IV, § 2, cl. 1, by denying them the right to participate in the political process in Virginia. The California plaintiff also alleges that the law violates the dormant Commerce Clause because the law prevents nonresidents from taking part in the business of public records in the

state. *McBurney v. Young*, No. 12-12, 2012 WL 2804998, 2012 U.S. Lexis 7806, (Oct. 5, 2012).

The Rhode Island plaintiff, Mark McBurney, requested documents pertaining to his petition for child support from the Virginia Division of Child Support Enforcement. McBurney's former wife lived in Virginia and after a nine-month delay in collecting child support from her, he sought to obtain documents to determine the source of the delay. However, Virginia denied the request because he was not a citizen of the state. McBurney eventually obtained most of the documents through Virginia's Government Data Collection and Dissemination Practices Act, but was never able to view the full records from his original request. VA Code Ann. § 2.2-3700.

The other plaintiff, Roger Hurlbert, is a California citizen and owns a business that requests real estate tax assessment records for clients. Hurlbert filed such a request under VFOIA, seeking records from Henrico County, but Virginia denied the request because Hurlbert was not a citizen of the state.

McBurney and Hurlbert filed a complaint in the U.S. District Court for the Eastern District of Virginia claiming the citizens-only limitation of VFOIA unconstitutionally denies them the "right to participate in Virginia's governmental and political processes" by preventing them "from obtaining information from Virginia's government," in violation of the Privilege and Immunities Clause of the U.S. Constitution. The clause prohibits a state from discriminating against citizens of other states in favor of its own residents. U.S. Const. art. IV § 2 cl. 1.

Hurlbert independently claimed that the act also violates the dormant Commerce Clause "because it grants Virginia citizens an exclusive right of access to Virginia's public records" and prevents him "from pursuing any business stemming from Virginia public records on substantially equal terms with Virginia citizens." The dormant Commerce Clause restricts state action on interstate commerce and is not explicit in the Constitution, but is inferred from the Commerce Clause's grant of power to Congress. U.S. Const. art. I § 8 cl. 3.

On Jan. 21, 2011, the U.S. District Court for the Eastern District of Virginia granted summary judgment for the

defendant, Virginia's Director of the Division of Child Support Enforcement, Nathaniel Young. The Fourth Circuit dismissed the previously named defendant, Virginia's Attorney General Kenneth Cuccinelli, as an improper defendant in a 2010 proceeding. In the 2011 district court decision, the court upheld the Virginia law, holding that the plaintiffs failed to show that VFOIA burdened a fundamental right under the Privileges and Immunities Clause. Defining a fundamental right as one that is "sufficiently basic to the livelihood of the Nation," the court determined that both access to government information and the right to advocate for one's own economic interests were insufficient rights to be considered fundamental and were therefore not protected under the clause. Thus, the court rejected the plaintiffs' privileges and immunities claim. The full text of the district court opinion is available online at [http://scholar.google.com/scholar\\_case?case=8296228783536529996&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholarr](http://scholar.google.com/scholar_case?case=8296228783536529996&hl=en&as_sdt=2&as_vis=1&oi=scholarr). *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439 (E.D. Va. 2011).

The district court also rejected Hurlbert's dormant Commerce Clause claim, categorizing the clause as prohibiting laws directed at protecting in-state business, but allowing regulations with "incidental" effects on interstate commerce. The court found that VFOIA's purpose was to foster access to public records and even though "the law may have some incidental impact on out-of-state business, the goal is not to favor Virginia business over non-Virginia business."

On Feb. 1, 2012, the Fourth Circuit unanimously affirmed the district court's judgment, finding no violation to the Privileges and Immunities Clause or the dormant Commerce Clause. *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012).

The U.S. Supreme Court's review of the decision will settle a split between the Third and Fourth Circuits. On Aug. 16, 2006, the Third Circuit held in *Lee v. Minner* that a citizens-only restriction on access to public records in the Delaware Freedom of Information Act violated the Privileges and Immunities Clause and enjoined the state from enforcing it. The case involved a New York citizen, Matthew Lee, who requested records regarding Delaware's decision to resolve an investigation into a consumer finance

company's deceptive lending practices, by joining a settlement with the group. Lee was an author who published articles about predatory practices of financial service companies and governmental regulation of those companies. The court held that Delaware's denial of the request based on Lee's citizenship violated the U.S. Constitution by impacting his fundamental right to engage in political advocacy. 458 F.3d 194 (3d Cir. 2006). (For more on *Lee v. Minner*, see "Federal Court Rules Delaware FOIA State Resident Restriction Unconstitutional" in the Spring 2005 issue of the *Silha Bulletin*.)

In *McBurney*, the Fourth Circuit acknowledged the Third Circuit's contrary decision, but noted that the holding was from an out-of-circuit court and therefore was not binding. The court also distinguished the case, stating that *McBurney* and *Hurlbert* sought "access to information of personal import rather than information to advance the interests of other citizens or the nation as a whole, or that is of political or economic importance." Therefore, the court concluded that the fundamental right identified in *Lee* was not relevant to the *McBurney* case.

In the petition for a writ of *certiorari*, the plaintiffs called the case an "important question of constitutional law at the intersection of federalism, freedom of information, and the burgeoning marketplace for public records." If the Supreme Court finds the Virginia statute violates the Constitution, it will affect similar laws in Tennessee, Arkansas, Georgia, and New Hampshire.

Several open-government advocates, including Citizens for Responsibility and Ethics in Washington and the National Freedom of Information Coalition, filed an *amicus* brief with the Supreme Court arguing that the law has "a real, detrimental impact on noncitizens' fundamental rights." A group of news organizations, including the American Society of News Editors, also filed an *amicus* brief asking the Supreme Court to invalidate the law. The brief states that the citizen requirement obstructs newsgathering. "The 'citizen' language provides a convenient excuse for agencies to withhold information they do not want out," Frank Gibson, founding director of the Tennessee Coalition for Open Government said, discussing the citizens-only limit in the Tennessee law, in a Sept. 19, 2012, First Amendment Center report. "Reporters at Tennessee news organizations can't get certain records from border cities because

they may live in Georgia, Mississippi, Arkansas, Kentucky, and Virginia and carry drivers licenses from [those states rather than Tennessee]." The full text of the brief is available online at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-17-Amicus-Crew-et-al..pdf>.

In another *amicus* brief, the Coalition for Sensible Public Records Access, along with information-gathering businesses, endorsed Hurlbert's

"The 'citizen' language [of VFOIA] provides a convenient excuse for agencies to withhold information they do not want out. Reporters at Tennessee news organizations can't get certain records from border cities because they may live in Georgia, Mississippi, Arkansas, Kentucky, and Virginia and carry drivers licenses from [those states rather than Tennessee]."

— Frank Gibson,  
Founding Director,  
Tennessee Coalition for Open Government

argument that VFOIA violates the dormant Commerce Clause by discriminating against noncitizens in interstate commerce. "The business of collecting, aggregating, indexing, and creating new services from public records is interstate commerce," the brief said. For example, in a 2000 U.S. Supreme Court case, *Reno v. Condon*, the Court held that driver's license records can be viewed as "article[s] of commerce." Thus, limiting access to driver's license records and other public documents can be considered an impermissible regulation of interstate commerce under the dormant Commerce Clause. *Reno v. Condon*, 528 U.S. 141 (2000). In an October 8 First Amendment Center post, Legal Correspondent Tony Mauro called the dormant Commerce Clause violation "potentially a winning argument," as the current Supreme Court tends to be "pro-business." The full text of the brief is available online at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-17-Coalition-for-Sensible-Public-Records-Access-et-al..pdf>.

Judicial Watch, a non-partisan education foundation that promotes transparency and accountability in

government, also encouraged the Supreme Court to strike down the citizens-only provision and submitted a historical brief to the court calling the right to public records a "basic right of all persons in democratic societies."

Megan Rhyne, executive director of the Virginia Coalition for Open Government, said she believes the law not only harms noncitizens, but can also disadvantage the Virginia government itself, in an Oct. 9, 2012

National Freedom of Information Coalition story. As an example, Rhyne cited "the Ohio business owner who has a fantastic idea for providing a service to a local [Virginia] government but can't get hold of previous project bids to craft his proposal." Further, Rhyne argued that the law does not benefit the government, as noncitizens will just find a Virginia resident to make

the request for them. "The government doesn't save any time or money in those cases because they still, eventually, have to do the work," Rhyne said for the October 9 report.

The Supreme Court will likely hear arguments in the case in early 2013 and is expected to issue a decision before July, according to the October 8 First Amendment Center column.

### ***Obama Administration Fails to Deliver on Promise of Transparency***

Despite President Barack Obama's promise to increase transparency in government through FOIA, a *Washington Post* investigation found that "by some measures the government is keeping more secrets than before" his administration began, according to the Aug. 3, 2012 story.

In 2011, the number of requests denied under an exemption to FOIA rose 10 percent, from 22,834 to 25,636, according to *The Washington Post's* August 3 report. In addition, Obama's promise to declassify more than 370 million pages of archived material will likely fail to meet the December 2013 deadline, according to Sheryl Shenberger, director of the National

**Open records, continued on page 8**

# Copyright Cases Around the Country Address Illegal Downloading, the Sale of Foreign-Made Works in the U.S., and the Aggregation of Online Listings

New technology continues to test copyright law in courts across the United States. On Oct. 29, 2012 the Supreme Court of the United States heard oral arguments for a case involving a student who was found liable for copyright infringement for his online book selling activity. Supap Kirtsaeng legally purchased foreign-made textbooks abroad and used websites to sell the books to domestic consumers without the copyright holder's permission, raising questions about the status of copyright protection for goods made elsewhere and sold in the United States.

## COPYRIGHT

Infringing activity online was also examined in a pair of illegal music downloading cases. After several years of litigation in various courts, damage awards appear decided against two illegal online music downloading and sharing defendants, Joel Tenenbaum and

Jammie Thomas-Rasset. In addition, the Canadian Supreme Court has changed its approach to royalties for music downloads.

Finally, the status of copyright protection for factual information online was brought into question when Craigslist, a free online classified listing website, sued two organizations that Craigslist alleges illegally used its listings, infringing on its ownership rights. One of these organizations has responded with antitrust claims against Craigslist, raising issues about how information posted on the Internet can be used by third parties.

### ***U.S. Supreme Court Addresses Whether Legally Purchased Copyrighted Works Can Be Resold in the U.S. Under the First Sale Doctrine***

The U.S. Supreme Court heard arguments in *Kirtsaeng v. John Wiley & Sons*, No. 11-697, on Oct. 29, 2012. The case presents the issue of whether it is legal for individuals to buy textbooks and

other copyrighted works overseas, where they may be less expensive, and resell them for a profit in the United States. The market for goods made abroad and resold at low prices domestically is known as the "gray market." Some argue it benefits consumers by providing low prices, but many businesses argue this "gray market" undercuts their prices and harms their domestic markets. Those in favor of the "gray market" assert the first sale doctrine as a defense. The first sale doctrine "permits the owner of a lawfully purchased copyrighted work to resell it without limitations imposed by the copyright holder," according to the U.S. Court of Appeals for the Second Circuit's decision in the case.

The petitioner, Supap Kirtsaeng, is a Thai student who was studying at Cornell University in 1997 and later moved to California to pursue a doctoral degree. His parents and friends legally purchased and sent him textbooks published by the respondent, Wiley, that had been both printed and purchased abroad between

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Declassification Center, the agency in charge of the effort. The group released a progress report in July 2012, stating that the center had reviewed less than 14 percent of the documents.

"I don't like to admit defeat, so I really absolutely must not say that we will not meet the deadline," Shenberger told *The Post* for its August story. "I would prefer to say that we're going to show great progress, and we will absolutely accomplish certain steps in our progress. But if a person only associates accomplishment of the goal with all 372 million pages made available to the public, no."

Shenberger pointed, in part, to a lack of resources as the cause of the delay. Other agencies with limited resources for FOIA responses outsource parts of the process to private contractors. The contractors are given authority to request the documents and provide recommendations to the agency about how much information can be released. FOIA does not allow the contractors to approve the agency responses to requests, but the private companies

can "support" the process of preparing the responses. However, some open government advocates argue that the use of contractors creates a problem, as the companies are not directly subject to the rules of FOIA.

"If I was in charge of an agency and wanted to create an unaccountable FOIA process, the first thing I would do is put an outside contractor in charge of it because fewer of our accountability laws apply to them," John Wonderlich, policy director at the Sunlight Foundation, an open records advocacy group, told *Bloomberg News* for an Oct. 8, 2012 story. "It would just be another layer between me and the public."

A lack of enforcement mechanisms also contributes to unanswered and late responses to FOIA requests. Under the Act, agencies are required to answer within 20 days, but noncompliance situations are generally undocumented and only addressed if the media or watchdog groups point them out. In addition, an audit released in December 2012 by the National Security Archive, a nonprofit organization dedicated to

declassifying government documents, found that almost 70 percent of federal agencies have not updated their FOIA regulations, despite encouragement from U.S. Attorney General Eric Holder in a memorandum issued March 19, 2009. Some of the agencies that did update their regulations did so in manner contrary to the current law or Obama's promise of transparency, according to the group. The full text of the report is available online at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB405/>.

"There's no hammer," Patrice McDermott, director of OpenTheGovernment.org, a group of open government advocates, told *The Washington Post* for a Dec. 4, 2012 story. "There doesn't seem to be any repercussions, and no one is holding these agencies accountable. Nobody in the government is holding their feet to the fire."

— EMILY MAWER  
SILHA RESEARCH ASSISTANT



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2007 and 2008. The books were foreign editions that differed from the versions sold in the United States in their “design, supplemental content... and the type and quality of materials used for printing.” The foreign editions included legends designating that the books were for sale only in particular locations. One legend read, for example, “Authorized for sale in Europe, Asia, Africa and the Middle East Only. This book is authorized for sale in Europe, Asia, Africa and the Middle East only [and] may not be exported. Exportation from or importation of this book to another region without the Publisher’s authorization is illegal and is a violation of the Publisher’s rights. The Publisher may take legal action to enforce its rights. The Publisher may recover damages and costs, including but not limited to lost profits and attorney’s fees, in the event legal action is required.”

Kirtsaeng sold the books in the United States on commercial Internet websites, including eBay, an online auction website. The trial court determined that Kirtsaeng earned revenues of \$1.2 million in his PayPal account from the sales of the books. PayPal is a service that allows users to make and receive monetary payments online.

Wiley filed suit against Kirtsaeng in the U.S. District Court for the Southern District of New York in 2008. A jury awarded Wiley damages of \$600,000 after finding that Kirtsaeng sold foreign-made textbooks in the domestic market without permission.

The Second Circuit held that “the first sale doctrine does not apply to works manufactured outside” the United States based on an analysis of the relevant text of the Copyright Act, § 109(a), which is the basis for the first sale doctrine. The doctrine allows a purchaser of a work to resell it without any limits imposed by the copyright holder. Because the text of the statute includes the phrase “lawfully made under this Title,” the court determined that the phrase “refers specifically and exclusively to works that are made in territories in which the Copyright Act is law, and not to foreign-manufactured works.” The court also relied on the U.S. Supreme Court’s decision in *Quality King v. Lanza Research International, Inc.*, 523 U.S. 135 (1998). In *Quality King*, copyrighted works manufactured in the United States were exported abroad, then imported back into the domestic market, and sold without the permission of the copyright owner. The Supreme Court held that

a foreign distributor selling works originally sold abroad but manufactured in the United States could assert the first sale doctrine as a defense. The Second Circuit distinguished *Kirtsaeng* from *Quality King* because, unlike the goods in *Quality King*, the works at issue in *Kirtsaeng* were not manufactured in the United States. 654 F. 3d 210 (2011).

The U.S. Supreme Court heard a similar case in 2010 but did not fully resolve the issues, as the court was

Affirming the Second Circuit’s decision “would mean that libraries conceivably could not lend books that were printed abroad — not only books from foreign publishers, but American-published books that are merely printed overseas.”

— Jonathan Band  
Attorney for The Library Copyright Alliance

split in its decision. The case, *Costco Wholesale Corp. v. Omega, S.A.*, involved Swiss-made Omega watches, which a New York company imported and sold to Costco. 131 S.Ct. 565 (2010). Costco then sold the watches to its customers at much lower prices than the going rate for Omega watches manufactured domestically. The U.S. Court of Appeals for the Ninth Circuit held that, for purchases of goods outside the United States, the first sale doctrine is not a defense to copyright infringement, which the U.S. Supreme Court affirmed. However, Justice Kagan recused herself because she signed a brief advocating Omega S.A.’s position in her prior role as Solicitor General of the United States, and the court handed down a 4-4 decision, making it only binding on the Ninth Circuit. By granting *certiorari* in *Kirtsaeng*, the Supreme Court should resolve the question “of how the first sale doctrine and §602 [of the Copyright Act] apply to copies of copyrighted works made and legally acquired abroad, then imported into the United States,” according to an Apr. 27, 2012 post by McDermott, Will, & Emery intellectual property attorneys Paul Devinsky and Rita Weeks on the Chicago law firm’s website. The Supreme Court’s full opinion in *Costco Wholesale Corp. v. Omega, S.A.* is available online at <http://supreme.justia.com/cases/federal/us/562/08-1423/percuriam.html>.

A number of industries have taken an interest in the case. Goodwill, eBay,

Google, Costco and other companies involved in online and discount selling that offer low prices on goods made abroad have expressed concern about the impact of a restriction on where foreign-made goods can be sold, according to an Oct. 29, 2012 story in *Huffington Post*. In addition, librarians are concerned that a ruling that the first sale doctrine does not apply to works made abroad would limit or eliminate their ability to lend such materials. The

Library Copyright Alliance, which represents information professionals and libraries across the United States and in Canada, submitted an *amicus* brief to the Supreme Court on July 3, 2012. The author of the brief, attorney Jonathan Band, spoke with

*Publishers Weekly* for a May 25, 2012 story. Affirming the Second Circuit’s decision “would mean that libraries conceivably could not lend books that were printed abroad — not only books from foreign publishers, but American-published books that are merely printed overseas,” Band said. The full *amicus* brief is available online at <http://www.librarycopyrightalliance.org/bm~doc/lca-kirtsaeng-brief-3july2012.pdf>.

However, other organizations filed *amicus* briefs in support of Wiley’s position. The Association of American Publishers (AAP), the principal trade organization of the publishing industry, was among those groups who submitted a friend-of-the-court brief encouraging the Supreme Court to affirm the Second Circuit’s decision. AAP argued that overturning the decision and applying the first sale doctrine to works made abroad would cause domestic markets to be “superseded by lower-priced copies created for and previously sold in foreign markets,” to be “collected and resold en masse in the U.S.” The full text of AAP’s *amicus* brief is available online at [http://www.publishers.org/\\_attachments/docs/press/kirtsaeng-v-wiley\\_aap-amicus.pdf](http://www.publishers.org/_attachments/docs/press/kirtsaeng-v-wiley_aap-amicus.pdf).

During oral arguments before the court on October 29, the justices asked difficult questions of both sides, particularly Justice Elena Kagan, who is considered as the swing vote by commentators because she recused

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**Copyright**, continued from page 9 herself from the *Omega* case. Ronald Mann, professor of law at Columbia University, shared his observations of the arguments in an October 31 post for SCOTUSblog. Mann said that the justices, although tough on both sides, focused mostly on the consequences of Wiley's proposition that goods manufactured abroad cannot be legally sold in the United States without the copyright holder's permission. Justice Stephen Breyer called the potential consequences of a decision in Wiley's favor a "parade of horrors," and specifically cited the example of an imported Toyota car with a copyrighted stereo system, suggesting the car could not be legally resold in the United States under Wiley's view.

The U.S. Government also argued before the court as *amicus curiae* on behalf of Wiley. But Deputy Solicitor General Malcolm Stewart conceded during oral argument that the negative consequences that would result from Wiley's position, like Justice Breyer's Toyota car example, would be a worse outcome than the "frustration" of publishers' attempts to geographically segment their markets. Mann wrote, "...[O]ne thing is certainly clear: the publishers did not win over any new votes with the argument today, and the government's concession that it could not accept the publisher's position well might have sealed their defeat." The full transcript and audio of the oral argument is available at [http://oyez.com/cases/2010-2019/2012/2012\\_11\\_697](http://oyez.com/cases/2010-2019/2012/2012_11_697).

### ***Two U.S. Cases of Illegal Downloading and Filesharing of Music Result in Large Damages Awards, While the Canadian High Court Changes its System of Royalties Entirely***

#### **U.S. Supreme Court Refuses to Hear *Tenenbaum v. Sony BMG Music, et al.***

In its orders for May 21, 2012, the U.S. Supreme Court denied recent Boston University doctoral graduate Joel Tenenbaum's petition for *certiorari* in *Tenenbaum v. Sony BMG Music, et al.*, No. 12-2146. The full text of the order is available online at <http://www.supremecourt.gov/orders/courtorders/052112zor.pdf>.

Tenenbaum filed his petition appealing a \$675,000 jury verdict against him for illegally downloading 30 songs and sharing them on a peer-to-peer file sharing network, Kazaa, according to a May 21, 2012 NPR blog post. Because

the court denied *certiorari*, the \$675,000 judgment in favor of the industry group, the Recording Industry Association of America (RIAA), stands.

Tenenbaum's attorney, Harvard Law Professor Charles Nesson, told the First Amendment Center "he was disappointed the high court wouldn't hear the case," but that the First Circuit "instructed a new federal judge to consider reducing the award without deciding any constitutional challenge" to the Copyright Act for a May 21, 2012 story. Tenenbaum argued that the Copyright Act was unconstitutional as applied to him because it should not apply to cases of "consumer copying," situations in which consumers illegally download songs that would cost them 99 cents to purchase legally and share them with other consumers. Tenenbaum also argued that the damages award violated his due process rights.

Later in the summer, on remand from the First Circuit, Judge Rya W. Zobel considered the issue of whether to reduce the damages against Tenenbaum under the doctrine of remittitur, Bloomberg reported on Aug. 28, 2012. The doctrine of remittitur allows the court to reduce an award by a jury that seems excessive under the circumstances. Zobel determined in an Aug. 23, 2012 decision that under the "stringent standard" established for common law remittitur, Tenenbaum did not have a basis for such a claim because "a rational appraisal of the evidence before the jury, viewed in the light most favorable to the verdict, supports the damages award." *Sony BMG Entm't v. Tenenbaum*, 2012 U.S. Dist. LEXIS 119243 (D. Mass., Aug. 23, 2012). The full text of Zobel's order is available online at <http://www.scribd.com/doc/103737792/Sony-BMG-v-Tenenbaum-Order-August-23-2012>.

Considering the implications of Tenenbaum's case, First Amendment Center President Ken Paulson wrote in a May 21, 2012 commentary that future cases like Tenenbaum's are unlikely. Paulson reported that RIAA sent letters about illegal downloading to more than 30,000 people demanding \$3,500 payment, and filed lawsuits against 12,000 people. Two of those cases went all the way to a jury trial — Tenenbaum and Jammie Thomas-Rasset. However, now "[t]he recording industry has essentially abandoned the strategy of suing consumers because of the public-relations beating it took," said Paulson. "Even with the law on their side, record companies looked like bullies when they

sued young and low-income consumers for large sums of money." Paulson wrote that the RIAA's new strategy involves "working with Internet service providers to identify illegal file-sharing and to cut off service to offenders." (For more on the history of Tenenbaum's case, see "Updates: Punishments for Music Copyright Infringers" in the Fall 2010 issue of the *Silha Bulletin* and "Juries Assess Large Damages against Music File Sharers in Minnesota and Massachusetts" in the Summer 2009 issue of the *Silha Bulletin*.)

#### **Eighth Circuit Maintains Damages in *Capitol Records et al. v. Thomas-Rasset***

In a Sept. 11, 2012 decision, the U.S. Court of Appeals for the Eighth Circuit reinstated a damages award of \$222,000 against Jammie Thomas-Rasset, one of two people to take a lawsuit for illegal downloading and file-sharing of music to a jury trial. Thomas-Rasset's case has a complex procedural history marked by three separate jury trials with damages awards ranging from \$54,000 to \$1.92 million. *Capitol Records et al., v. Thomas-Rasset*, 692 F.3d 899, 2012 U.S. App. LEXIS 19040 (8th Cir. 2012). (For more on the history of Thomas-Rasset's case, see "Updates: Punishments for Music Copyright Infringers" in the Fall 2010 issue of the *Silha Bulletin* and "Juries Assess Large Damages against Music File Sharers in Minnesota and Massachusetts" in the Summer 2009 issue of the *Silha Bulletin*.)

Chief U.S. District Court Judge for the District of Minnesota Michael Davis reduced a jury award of \$222,000 to \$54,000, according to a Sept. 12, 2012 story in the Minneapolis *Star Tribune*. However, writing for a unanimous panel of three judges, U.S. Court of Appeals for the Eighth Circuit Judge Steven Colloton wrote that the district court erred in reducing damages to \$54,000 and that the "award of \$9,250 per each of twenty-four works is not so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Capitol Records, Inc. v. Thomas-Rasset*, 799 F.Supp. 2d 999, 2011 U.S. Dist. LEXIS 85662 (D. Minn. 2011). The full text of the opinion is available online at <http://www.ca8.uscourts.gov/opndir/12/09/112820P.pdf>.

Rasset-Thomas told the Associated Press (AP) on Sept. 11, 2012 that she will continue to appeal the damages award. Rasset-Thomas's lawyer, K.D. Camara, filed a petition for a writ of *certiorari* with the U.S. Supreme Court on Dec.

10, 2012, presenting the question, “Is there any constitutional limit to the statutory damages that can be imposed for downloading music online?” The U.S. Supreme Court could take several months to decide whether to hear the case. The full petition is available online at <http://pub.bna.com/ptcjl/ThomasRasset2012Dec10.pdf>.

### **Canadian Rulings Eliminate Some Royalties for Downloads of Works Purchased Online**

As copyright battles involving music downloading work their way through the courts in the United States, Canadian courts recently took a different approach. The Supreme Court of Canada handed down a series of rulings holding that songwriters and music publishers may not receive royalties for consumers’ downloads of songs or video games or for samples of songs offered by online music retailers like iTunes.

The court ruled against royalties on the “downloading of music and video games containing music and on online previews of songs, but upheld a royalty on streaming of music over the Internet.” “The internet should be seen as a technological taxi that delivers a durable copy of the same work to the end user,” the court wrote. “The traditional balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creators of those works should be preserved in the digital environment.” The court concluded that regardless of how a copy of a work is distributed to its purchaser, the same restrictions from copyrights should apply, whether the work is purchased in a store or online. The Canadian opinions are available online at <http://www.documentcloud.org/documents/396573-2012scc34.html>, <http://www.documentcloud.org/documents/396651-2012scc38.html>, <http://www.documentcloud.org/documents/396652-2012scc35.html>, and <http://www.documentcloud.org/documents/396653-2012scc36.html>.

Jeremy de Beer, associate professor at the University of Ottawa, intervened in the case on behalf of the Canadian Internet Policy and Public Interest Clinic. “I think in the medium term we’re going to see an expansion of online music services — legitimate opportunities to buy and sell digital music on the Internet — because the process for clearing the rights got a lot simpler and less expensive with these judgments,” he told CBC News for a July 12, 2012 report.

### ***Craigslist Sues for Copyright Infringement of its Online Listings; Defendant Responds with an Antitrust Claim***

Craigslist.org, a site that has offered free online classified advertisements since 1995, filed a lawsuit alleging copyright and trademark infringement, among many other claims, against 3Taps and Padmapper, according to a July 29, 2012 post in *The New York Times*’s Bits blog. Craigslist filed suit in United States District Court for the Northern District of California. The case is *Craigslist, Inc. v. 3Taps, Inc. and Padmapper, Inc.*, case number CV-12-3816.

3Taps is a company that collects data and organizes it for developers of Internet applications to use. Padmapper collects apartment rental and sublet listings from Craigslist and make them available online in a digestible map application. Users of Padmapper view a map online and can click pins on the map to learn more about the listed apartment at that location.

“The listings are already out there. We’re finding them already on the Web and organizing them so other people don’t have to do the same thing twice,” Greg Kidd, the chief executive of 3Taps, told the *Times*. “And we’re not breaking any laws because we are pulling in the facts from the listing; everyone knows you can’t copyright facts.” Section 102 of the Copyright Act has been interpreted to mean that facts cannot be copyrighted. However, Andrew Mirsky, a technology and intellectual property attorney, wrote that Kidd’s argument that the facts cannot be copyrighted and are in the public domain may fail in a Nov. 29, 2012 post for the Citizen Media Law Project. Apartment listings that Craigslist posts, Mirsky wrote, may be protected by copyright as a “compilation of otherwise public facts” as they combine information including the address, pricing, and more. Craigslist’s terms of use may also provide Craigslist with a breach of contract claim. The website’s terms of use prohibit copying, but Mirsky wrote that 3Taps claims it is not bound by the terms of use because it “never touches Craigslist’s servers to obtain the data.”

Craigslist has taken similar actions against other websites that make use of Craigslist’s data, including shutting down access to data or sending cease-and-desist letters, according to the July 29, 2012 report in the *Times*.

The complaint filed by Craigslist contends that it “provides a unique and

highly valued service to its users, and has every right to limit the copying and distribution” of its content. “The adage, ‘no good deed goes unpunished,’ is fitting,” the complaint said. Craigslist alleges its work to maintain a free service for the public without advertising is being taken advantage of by “opportunists like 3Taps and PadMapper [who] now claim Craigslist’s content is ‘free’ for them to misappropriate whole and commercially exploit, even for the purpose of developing rival businesses.” The full text of Craigslist’s complaint is available online at <http://www.scribd.com/doc/100933709/Craigslist-v-PadMapper>.

Eric Goldman, director of Santa Clara University’s High Tech Law Institute, spoke with the *San Francisco Chronicle* about the lawsuit for a Aug. 4, 2012 story. “If the ads are on Google, [Craigslist is] already releasing the advertisements to the wild in a way that releases them to all these downfalls,” Goldman said.

In response to Craigslist’s suit, 3Taps filed an antitrust claim against Craigslist in U.S. District Court for the Northern District of California, according to a Sept. 24, 2012 story in the *Times*. In a Sept. 24, 2012 news release, Greg Kidd commented on Craigslist’s action in filing its suit against 3Taps and other similarly situated companies. “As Craigslist spends heavily to bully and intimidate companies that challenge them, consumers are deprived of better ways to find and execute real-time exchange transactions,” he said. “Craigslist uses its monopoly position to achieve huge annual profits without sinking any meaningful costs into research and development or innovation.” Kidd reiterated that Craigslist’s data are public facts, which cannot be copyrighted. “Sham copyright claims and unenforceable terms of use cannot stand when they deceive users, intimidate innovators or thwart a competitive marketplace,” Kidd said. Craigslist has not responded to requests for comment related to either lawsuit. However, in commenting on a similar case in July 2010, Craigslist founder Craig Newmark told the question-and-answer site Quora, “Actually, we take issue with only services which consume a lot of bandwidth, it’s that simple.”

— CASSIE BATCHELDER  
SILHA RESEARCH ASSISTANT

# State Limits on Campaign Contributions Remain in Effect for 2012 Election Season; Voters Call for Amendment to Overturn *Citizens United*

**D**espite the Supreme Court of the United States' 2010 ruling in *Citizens United v. FEC*, 558 U.S. 310 (2010), holding that it is a violation

of the First Amendment to suppress corporate campaign spending, several state limits on campaign finances have been upheld by federal appellate courts, and the Supreme Court has declined to weigh in. Meanwhile, voter resolutions calling for a federal amendment to overturn the *Citizens United* decision passed in two states with strong support in November.

In September and October 2012, the U.S. Court of Appeals for the Seventh, Eighth, and Ninth Circuits upheld state campaign contribution limits in Illinois, Minnesota, and Montana. Although the U.S. Supreme Court ruled in *Citizens United* that a law banning corporate campaign spending violated the corporations' First Amendment right to support political candidates, the federal appellate courts upheld the contribution limits as only marginal restrictions on speech supported by a compelling government interest in fair elections. But, as public support for reversal of the *Citizens United* decision grows, free speech advocates have voiced concerns at the effect a constitutional amendment would have on First Amendment rights. (For more on the *Citizens United* decision, see "Supreme Court Strikes Down Campaign Finance Regulation for Corporations," in the Winter/Spring 2010 issue of the *Silha Bulletin*.)

## ***Ninth Circuit Upholds Montana's Campaign Contribution Limits; U.S. Supreme Court Refuses to Overturn***

On Oct. 16, 2012, the U.S. Court of Appeals for the Ninth Circuit upheld a Montana law regulating the amount that individuals, political committees, and political parties can contribute to candidates for state office, citing a compelling government interest in preserving the integrity of the electoral process. Montana Code § 13-37-216.

Passed in 1972, the Montana regulation is part of a long series of campaign finance and disclosure rules in the state, dating back to the Corrupt Practices Act of 1912, § 13-35-227(1),

according to Montana Attorney General Steve Bullock. Bullock advocated that the law should be upheld, writing that the system of regulations has allowed Montana elections to be "reasonable in cost and among the fairest in the country," in a June 15, 2012, op-ed column for the *Los Angeles Times*. The Montana Legislature has also strongly supported the regulations in the past. An amendment decreasing the maximum contributions allowed under the law at issue passed the Montana House of Representatives 41 to 9 in 2003. S.B. 423.

The case began in the U.S. District Court for the District of Montana, when a group of Montana corporations challenged the law, claiming it violated their free speech rights. On Oct. 10, 2012, a senior district judge agreed and enjoined the state of Montana from enforcing the limits. *Lair v. Murry*, No. CV 12-12-H-CCL, 2012 WL 4815411, 2012 U.S. Dist. LEXIS 146645 (D. Mont. Oct. 10, 2012).

On Oct. 16, 2012, the Ninth Circuit overturned the district court's decision and ordered a stay of the injunction until the court could make a decision on the appeal, citing the state of Montana's likelihood of success in the proceeding. The court noted the effect the injunction would have on the fairness of the upcoming election and the damage that the injunction would cause to the state and the public. "[T]hat harm vastly outweighs any minimal harm that might come to the interested parties who have operated under the established Montana contribution limits for almost two decades," Judge Jay S. Bybee wrote for the unanimous three judge panel. *Lair v. Bullock*, No. 12-35809, 2012 WL 4883247, 2012 U.S. App. LEXIS 21643 (9th Cir. Oct. 16, 2012).

Bullock called the Ninth Circuit's decision "an important victory for all Montanans, regardless of party affiliation." In an October 17 interview with the Associated Press (AP), Bullock said, "Montanans put a high value on the integrity and fairness of our election system, and the court has allowed us to maintain our citizen democracy, rather than putting our elections up for auction to the highest bidder."

Although the U.S. Supreme Court struck down the 1912 ban on Montana corporate political spending in *American*

*Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) in June, on Oct. 23, 2012, Justice Anthony Kennedy, on behalf of the Court, refused to lift the Ninth Circuit's order, leaving the limits on corporate spending in place through the November 2012 election. *Lair v. Bullock*, No. 12A395, 2012 WL 5201298, 2012 U.S. LEXIS 8266 (U.S. Oct. 23, 2012).

In the June challenge to the 1912 Montana law, the Supreme Court affirmed its holding in *Citizens United*. "The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law," the *per curiam* (unsigned) majority opinion wrote. "There can be no serious doubt that it does."

However, the dissent in the 5 to 4 decision, written by Justice Stephen Breyer, said that the decision in *Citizens United* was a mistake. The decision did not come as a surprise, even to those who hoped the case would be an opportunity for the Court to reexamine *Citizens United*, according to a June 25 Politico.com story. The story said the Court's philosophical make-up has not changed since 2010 and thus a chance of overturning the decision "appeared slim."

The denial of *certiorari* in the Ninth Circuit case was also not surprising to commentators, as the law involved limits on direct contributions to candidates, which the Supreme Court has upheld, even after *Citizens United*.

## ***Eighth Circuit Found a Minnesota Disclosure Requirement "Most Likely Unconstitutional," But Upholds Ban on Direct Corporate Donations to Candidates***

On Sept. 5, 2012, the U.S. Court of Appeals for the Eighth Circuit supported the challenge to a Minnesota law requiring disclosure of corporate political spending, writing that the law is "most likely unconstitutional." The law requires companies and organizations that raise or spend more than \$100 per year to keep detailed records of political contributions and expenditures. The group is also required to file regular reports with the state. Violating groups face fines and individuals could face prison time of up to five years. Minn. Stat. § 10A.12, subdiv. 1a.

Like Montana, Minnesota has a long history of campaign finance restrictions.

## **CAMPAIGN FINANCE**

According to a Minnesota Senate treatise, in a 1974 response to Watergate, Minnesota strengthened its campaign finance limits, enacting several laws — including the challenged disclosure requirement. Former Senate Counsel and General Counsel to Gov. Mark Dayton, Peter Wattson, who wrote the treatise, said that “Minnesota has long been a leader in campaign finance reform.”

In a 6 to 5 decision, the Eighth Circuit remanded the case to the U.S. District Court for the District of Minnesota, stating that the law violates the right to free speech and the challengers are “likely to win on their First Amendment claim.” Writing for the majority, Chief Judge William Jay Riley wrote that the law hinders and discourages associations from participating in “protected political speech.” “Under Minnesota’s regulatory regime, an association is compelled to decide whether exercising its constitutional right is worth the time and expense of entering a long-term morass of regulatory red tape,” Riley wrote. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012).

In the decision, the Eighth Circuit also upheld the district court’s decision to deny a preliminary injunction of a Minnesota law prohibiting corporations from directly donating to candidates. Minn. Stat. § 211B.15, subd. 2. The court quoted the Supreme Court’s 2003 decision in *FEC v. Beaumont*, 539 U.S. 146 (2003), writing that “[R]estrictions on contributions require less compelling justification than restrictions on independent spending.” The court wrote that the Minnesota law allowed corporations to establish a political action committee to participate in the political arena, therefore balancing the corporation’s right to free speech with the government’s interest in regulating campaign activity in the pursuit of fair elections.

### ***Seventh Circuit Upholds Illinois Limits on Campaign Contributions***

On Oct. 24, 2012, the U.S. Court of Appeals for the Seventh Circuit upheld a 2009 Illinois law that limits political contributions from individuals to \$5,000, contributions from unions and corporations to \$10,000, and contributions from political action committees to \$50,000. 10 Ill. Comp. Stat. 5/9-8.5 (2009). The Illinois Liberty Political Action Committee brought suit alleging that the limits violated the First Amendment. On October 5, the District Court for the Northern

District of Illinois denied the motion for a preliminary injunction, citing the potential for corruption if the limits were removed just a few weeks prior to the November election. A three-judge panel of the Seventh Circuit affirmed later that month, writing that the plaintiffs “have not shown that they are likely to succeed on the merits of their challenge to contribution limits.” *Ill. Liberty PAC v. Madigan*, No. 12-3305, 2012 WL 5259036, 2012 U.S. App. LEXIS 22743 (7th Cir. Oct. 24, 2012).

Diane Cohen, general counsel for the Liberty Justice Center, the group that filed the challenge on behalf of the Liberty Political Action Committee, said she was not surprised by the decision. “We knew it was going to be an uphill battle,” Cohen said in an October 25 Reuters report.

### ***Voters Call for Amendment to Overturn Citizens United in Montana, Colorado***

Following the November 2012 election, resolutions calling for a federal constitutional amendment to overturn *Citizens United* passed in both Montana and Colorado with more than 70 percent approval. The resolutions are the first of their kind to win approval from voters. Twelve states have acted to show support for the reversal of *Citizens United*, either through a resolution passed by the state legislature, a letter from the state legislature to Congress, or a voter referendum. The states who have taken such actions are: California, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Montana, New Jersey, New Mexico, Rhode Island, Vermont, and Washington.

Many of the state resolutions passed with bi-partisan support and the votes in Montana and Colorado also showed widespread approval of an amendment, as Colorado is a swing state and Montana is typically a red, or conservative, state.

“The results are pretty unequivocal that no matter if you’re a Democrat or a Republican or an Independent you’re pretty mad about *Citizens United*,” Derek Cressman, who helped author the Montana and Colorado resolutions, said in a Nov. 7, 2012, *Huffington Post* story.

However, U.S. Supreme Court Justice Samuel Alito, a supporter of the *Citizens United* decision, criticized the push for an amendment in a speech at the Federalist Society’s National Lawyers Convention on Nov. 15, 2012 in Washington D.C. Alito said that opponents of the opinion created an

effective public relations campaign by focusing on free speech for corporations and ignoring other beneficiaries of the decision, such as news media organizations. “The question is whether speech that goes to the very heart of government should be limited to certain preferred corporations; namely, media corporations,” Alito said at the November 15 event. “Surely the idea that the First Amendment protects only certain privileged voices should be disturbing to anybody who believes in free speech.”

In 2011 and 2012, federal legislators introduced 14 constitutional amendments to overturn the controversial case, 11 in the U.S. House of Representatives and three in the U.S. Senate. However, despite the proposal of six campaign finance amendments in 2010, an amendment has yet to pass and congressional support for the current proposals is unclear.

The resolutions at the state level are not binding, but supporters hope to encourage Congress to act by demonstrating the widespread support for an amendment. Derek Cressman said he had already received calls from people looking to pass similar resolutions in other states.

However, it is a long road to pass a constitutional amendment. The proposal would need to pass both bodies of Congress with two-thirds support and then would require ratification from 38 state legislatures.

Despite the recent wave of public support, some First Amendment advocates worry about the effect a possible amendment would have on free speech. In response to an amendment proposed by U.S. Reps. John Conyers (D-Mich.) and Donna Edwards (D-Md.), Gene Policinski, executive director of the First Amendment Center, wrote a Sept. 21, 2011 column warning of the threat the amendment posed to free speech. “Few likely would debate the motive that Conyers and Edwards say is behind the proposed amendment: fair elections, honest government,” Policinski wrote. “But good intentions don’t justify ignoring a basic concept that the Supreme Court majority pointed out in its ruling: Nothing in the First Amendment provides for ‘more or less’ free-speech protection depending on who is speaking.”

– EMILY MAWER  
SILHA RESEARCH ASSISTANT

# Courts Struggle to Balance Privacy and Transparency Interests in Recent FERPA Cases

Recent court decisions highlight the tension between open records laws and the Family Educational Rights and Privacy Act (FERPA). Although a North Carolina judge and a Utah public records committee recently ordered the release of university records, three cases this year have held that schools can withhold athletic program documents

## FERPA

based on FERPA. The decisions have led open records advocates to call for FERPA reform to better balance privacy and transparency concerns.

### ***Judges in Iowa, Ohio, and Illinois Cite FERPA in Rulings to Keep Records Private***

Three recent court decisions held that FERPA requires universities to keep athletic records sealed, raising concerns among open government advocates that the law is being used as an excuse for universities to withhold unflattering information.

FERPA, also known as the Buckley Amendment, 20 U.S.C. § 1232, was passed in 1974 and generally requires that a school obtain written consent from a student or parent before releasing any information from the student's "education record." Federal funds may be denied to schools that fail to follow the FERPA regulations, which appear at 34 C.F.R. § 99.1.

On July 16, 2012, the Iowa Supreme Court held that the University of Iowa can withhold records related to a 2007 sexual assault incident involving two university football players. The decision was the first of its kind in Iowa, according to a July 16 Associated Press (AP) report. *Press-Citizen Co., v. Univ. of Iowa*, 817 N.W.2d 480 (Iowa 2012).

The *Iowa City Press-Citizen* requested the records at issue, which included internal university correspondence, after the victim's mother accused school officials of being insensitive and attempting to cover up the incident. In response, the school released 18 pages of documents, but the newspaper filed suit seeking further disclosure. During the litigation the university released 950 more pages, according to the AP, and the Iowa state District Court ordered the disclosure of hundreds more documents. The university appealed the decision.

Writing for the majority in a 4 to 3 decision, Justice Edward Mansfield stated that if the records were released, the university could face losing millions in federal funding for violating FERPA. Mansfield added that redacting identifying information, as suggested by the district court, was not an option in this case, because the public already knew the names of the students involved.

Several news media groups, including the AP, submitted an *amicus* brief urging the court to release the records. Lawyers for the group argued that withholding documents based on public knowledge of the students' identities could "discriminate against those granted public information and outright chill some persons from exercising their rights to inspect public records," according to the AP.

Senior editor of the *Press-Citizen*, Tricia Brown, said she was disappointed by the ruling, but appreciated that the litigation did cause the release of some additional documents. "The university made a lot of changes in light of this case with their administration and their policies," Brown said in the July 16 AP story. "Had no one pushed to see these documents, those changes may never have happened," she said.

In a similar ruling, the Ohio Supreme Court held that documents related to the 2011 Ohio State football team scandal were protected by FERPA on June 19, 2012. The scandal involved an investigation of players who allegedly traded sports memorabilia for tattoos, according to a June 19 AP report. ESPN brought the suit seeking the release of the documents. The court unanimously held that the university had correctly applied FERPA in withholding the information. *ESPN v. Ohio State Univ.*, 970 N.E.2d 939 (Ohio 2012) (For more on *ESPN v. Ohio State Univ.* see "School Privacy Law Changes Could Challenge Media," in the Summer 2011 issue of the *Silha Bulletin*.)

The court noted that Ohio State University receives about 23 percent of its revenue from federal funds. "Ohio State, having agreed to the conditions and accepted the federal funds, was prohibited by FERPA from systematically releasing education records without parental consent," the court wrote in a *per curiam* (unsigned) decision. The court did require the university to grant access to a few records that could be redacted to eliminate personally-identifiable information.

An Illinois newspaper, the *State Journal-Register*, appealed another recent ruling upholding a university's application of FERPA on Sept. 21, 2012. The newspaper had requested records regarding the resignation of two University of Illinois softball coaches. The coaches resigned, citing other opportunities; however, two days later the university released a letter suggesting that one of the coaches engaged in inappropriate sexual behavior with several female students, according to a September 21 Student Press Law Center (SPLC) story.

In August 2012, Jersey County Circuit Judge Eric Pistorius ruled that FERPA prohibited the release of most of the requested documents, as they were considered education records.

The attorney representing the *State Journal-Register*, Don Craven, told the SPLC that he does not believe FERPA should have prevented the release of the documents.

"[The university is] not telling us what they knew," Craven said. "Are they protecting themselves or do they not want us to know what happened? Do they want the story to go away? I don't know."

### ***North Carolina Judge, Utah Committee on Public Records Order Release of University Records Not Related to Education***

On Aug. 9, 2012, a North Carolina state judge held that FERPA does not apply to records regarding prohibited benefits received by University of North Carolina student athletes, as the documents do not pertain to education.

Superior Court Judge Howard Manning ordered the university to release the "statements of facts" and reinstatement requests regarding the athletes the NCAA declared ineligible to play based on the accusations.

"Just as in the case of parking tickets, this kind of misbehavior has nothing to do with education," Manning wrote. "This kind of behavior (impermissible benefits - non-academic) does not relate to the classroom, test scores, grades, SAT or ACT scores, academic standing or anything else relating to a student's educational progress or discipline."

Andy Thomason, the editor-in-chief of the student newspaper that filed the suit, the *Daily Tarheel*, said he was pleased with the decision. "It just affirms our conviction all along that UNC is using

FERPA, continued on page 15

# Minnesota Courts Address Defamation Claims Stemming from Blog Posts and Online Reviews

**N**ovel questions about the First Amendment and the law of defamation related to speech individuals post online have come before Minnesota courts in recent months. The Minnesota Court of Appeals reversed a \$60,000 jury verdict for tortious interference against John “Johnny Northside” Hoff after a statement he posted on his blog resulted in the subject’s firing. In addition, the Minnesota Supreme Court heard arguments in a case in which a doctor’s alleges patient’s son posted a defamatory review of the doctor online.

## DEFAMATION

### *Minnesota Court of Appeals Overturns \$60,000 Jury Verdict for Tortious Interference with Contract Against a Local Blogger*

An Aug. 20, 2012 decision from the Minnesota Court of Appeals in *Moore v. Hoff*, No., A11-1923, 2012 WL 3553180 (Minn. Ct. App. Aug. 20, 2012), overturned a jury verdict against John Hoff, a north Minneapolis resident who writes a blog about local issues entitled “The Adventures of Johnny Northside.” A jury previously found Hoff liable for tortious interference with a contract after truthful statements on Hoff’s blog resulted in the plaintiff, Jerry Moore, being fired from his job.

Moore formerly directed a community council in north Minneapolis and

was fired from that position. The University of Minnesota’s Urban Research and Outreach-Engagement Center then hired Moore in 2009 to study mortgage foreclosures. After Hoff learned the university hired Moore, he penned a blog post alleging that Moore was involved in a fraudulent mortgage resulting in a 16-year prison sentence for Larry Maxwell, a real estate agent. Moore was not criminally charged in that case. The post in question read, “[Moore]— who has been a plaintiff in a lawsuit against JACC [Jordan Area Community Council], and was fired from his executive director position for misconduct, (fistfight, cough cough) is nothing if not a controversial figure in the Jordan

*Defamation, continued on page 16*

## FERPA, continued from page 14

FERPA inappropriately,” Thomason said in an August 9 SPLC report. “We’re very pleased and we think it’s a good sign. We hope to get those records.”

In another recent ruling, the Utah State Records Committee, an appeals board for the denial of Utah public records requests, determined that testimony and text messages documenting the inappropriate relationship between a student and a former high school football coach were not protected by FERPA. The Granite School District originally denied the records request from *The Salt Lake Tribune*, and at an Oct. 11, 2012 hearing, argued that the records were protected by FERPA, according to an October 12 SPLC report.

In a 3 to 2 decision, the committee ordered the release of the records after finding they could not be considered educational records under the Act.

Despite these victories for open government, the wave of cases that protected university records has led open records advocates to call for FERPA reform. (For more on FERPA and public universities see “School Privacy Law Changes Could Challenge Media,” in the Summer 2011 issue of the *Silha Bulletin*.)

### **Open Records Advocates Call for FERPA Reform to Promote Transparency**

Open Government advocates have accused universities of using FERPA to shield themselves from the obligations

of open records laws. SPLC Executive Director Frank LoMonte says FERPA may even be declared unconstitutional if challenged, following the U.S. Supreme Court’s healthcare ruling in *National Federation of Independent Business v. Sebelius* in June 2012. *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)

In the healthcare case, the Supreme Court struck down what it called a “gun to the head” threat of the loss of federal Medicaid dollars to compel states to comply with a federal policy decision. LoMonte wrote, in a September 13 SPLC column, that the threat of losing federal funding due to a FERPA violation is a similar proposition for universities. LoMonte offered the example of the University of Illinois, which receives 19.1 percent of its operating revenues from federal sources. The loss of this income following a FERPA violation would be potentially fatal for the university, according to LoMonte. Thus, he argued that FERPA does not give universities an actual choice of whether to follow FERPA’s guidelines, as violations would drastically reduce funding, making it unconstitutional under the healthcare ruling.

However, the SPLC is not waiting for the courts to take action on FERPA. On Oct. 9, 2012 the SPLC launched a campaign called “Let’s Break FERPA.” The initiative encourages students to use FERPA to request their own records. In addition to protecting the privacy of education records, the Act also requires

disclosure of any covered record to the student mentioned in the document.

According to LoMonte, if schools begin to receive an abundance of requests for FERPA records, the institutions will be forced to narrow their definitions of personal educational records that are protected by the law.

“Those videotapes and emails and parking tickets — documents commonly misclassified as FERPA records even when they contain no legitimately private information — suddenly won’t be FERPA records when hundreds of students show up demanding to inspect and correct them,” LoMonte wrote in his October 9 SPLC column.

Regardless of the success of the SPLC’s campaign or FERPA’s treatment in courts, the Act’s sponsor said it is used today in ways that he did not anticipate. Former U.S. Sen. James Buckley (Conservative-N.Y.), the principal sponsor of FERPA, told the Register-Guard of Eugene, Ore. that the original intent of the law was simply to allow parents access to their children’s academic records and to keep those documents private from others.

“One thing I have noticed is a pattern where the universities and colleges have used it as an excuse for not giving out any information they didn’t want to give,” Buckley said.

— EMILY MAWER  
SILHA RESEARCH ASSISTANT

**Defamation**, continued from page 15 neighborhood . . . Repeated and specific evidence in Hennepin County District Court shows [Moore] was involved with a high-profile fraudulent mortgage at 1564 Hillside Ave. N." The University of Minnesota fired Moore after receiving an email from another blogger, Don Allen, and after Hoff's blog post was published. Allen's email was also posted in the comments section of Hoff's blog. Moore sued Allen, in addition to Hoff, as a result of his firing, but Allen settled before the case went trial and testified against Hoff.

In Hennepin County District Court, Moore's claim for defamation was dismissed. However, in March 2010 a jury found Hoff liable for tortious interference with a contract, which occurs when one party intentionally damages another party's contractual relationships. But the jury found that Hoff's statements about Moore were not false. The jury awarded Hoff \$35,000 for lost wages and \$25,000 for emotional distress. After the trial, Hoff and his attorney, Paul Godfread, moved for a new trial. District Court Judge Denise Reilly denied the motion and Hoff filed an appeal with the Minnesota Court of Appeals. (For more on the background of the case, see "Defamation Lawsuits Pose Threat to Journalists as Online Communication Complicates First Amendment Analysis" in the Spring 2012 edition of the *Silha Bulletin* and "Outrageous Speech, 'Trash Torts' and the First Amendment" in the Winter/Spring 2011 edition of the *Silha Bulletin*.)

Godfread and media attorney Mark Anfinson argued on Hoff's behalf before the Minnesota Court of Appeals. John Borger and Leita Walker, partner and associate, respectively, at Faegre Baker Daniels, submitted an *amicus* brief on behalf of the Silha Center, the Minnesota chapter of the Society of Professional Journalists, and the Reporters Committee for Freedom of the Press. The *amicus* brief is available online at [http://www.silha.umn.edu/assets/pdf/Moore\\_vs\\_Hoff.pdf](http://www.silha.umn.edu/assets/pdf/Moore_vs_Hoff.pdf).

Writing for the appellate panel, Judge Jill Flaskamp Halbrooks said, "Because the jury's verdict is contrary to established law and appellant's alleged tortious acts are too intertwined with constitutionally protected conduct to avoid infringing on appellant's First Amendment rights, we reverse and remand." The court reasoned that the non-defamatory statement made by Hoff could not serve as the basis for a claim of tortious

interference, explaining that, to prove tortious interference with a contractual relationship, the plaintiff must establish: (1) that a contract existed; (2) the defendant's knowledge of the contract; (3) intentional accomplishment of the contract's breach; (4) without justification; and (5) damages to the plaintiff. "Hoff's blog post is the kind of speech that the First Amendment is designed to protect," Flaskamp Halbrooks wrote. "He was publishing information about a public figure that he believed was true (and that the jury determined was not false) and that involved an issue of pub-

"It's important to have a strong re-affirmation of the principle that truthful speech does not support a lawsuit for tortious interference."

— John Borger  
Attorney, Faegre Baker Daniels

lic concern . . . Attaching liability to this speech would infringe on Hoff's First Amendment rights." The decision from the court of appeals is available online at <http://www.medialaw.org/images/medialawdaily/hoff.pdf>.

"It's important to have a strong re-affirmation of the principle that truthful speech does not support a lawsuit for tortious interference," Borger said in an interview with online news source Twin Cities Daily Planet for a June 5, 2012 story. "We think it is important to recognize and reaffirm when speech is involved and the First Amendment is involved, that the reviewing court needs to apply an independent standard of review looking at all the evidence."

Itai Maytal, an associate attorney with Miller Korzenik Sommers and a former First Amendment Fellow with *The New York Times* Company, said the case offered a "welcome vindication of the general principle that truth is an absolute defense to a claim for defamation and to claims for tortious interference with a contract or prospective business advantages arising out of an allegedly defamatory statement," in an Aug. 30, 2012 commentary for Citizen Media Law Project. "But, it is troubling in as much as the defendant had to incur the time and expense of a jury trial and an uncertain appeal in order to receive the relief he was entitled. In that respect, it offers the cautionary tale to bloggers that reporting the truth, while important

and socially valuable, may not come without a price," Maytal wrote.

The time period for Moore to appeal the appellate court's decision to the Minnesota Supreme Court has passed without a filing from Moore, so the ruling will stand.

### ***Duluth Doctor's Claim for Defamation Based on an Online Review Reaches the Minnesota Supreme Court***

Displeased by the treatment his father received in the hospital, Dennis Laurion took his complaint online. Laurion wrote a review of Dr. David McKee, a neurologist who treated his father at St. Luke's Hospital in Duluth, Minn. following a stroke, on a rate-your-doctor website.

Laurion wrote in the online review that his

family was displeased with McKee's "bedside manner." The review read, "When I mentioned Dr. McKee's name to a friend who is a nurse, she said, 'Dr. McKee is a real tool!'" according to a March 24, 2012 story in the Minneapolis *Star Tribune*. Laurion's complaint focused on Dr. McKee's "body language and comments" when he treated Laurion's father on April 20, 2010.

McKee reportedly read the comments online after another patient alerted him to their existence. McKee responded by filing a lawsuit for defamation and sought more than \$50,000 in damages in district court in Duluth. He claimed he has spent \$7,000 attempting to eliminate the comments from the Internet. "It's like removing graffiti from a wall," McKee's lawyer, Marshall Tanick, a partner with Mansfield, Tanick & Cohen, P.A. told the *Star Tribune*. He argues Laurion has continued to distort the facts of the situation, both online and in complaints he has filed with various medical groups since the original online complaint. "He put words in the doctor's mouth," and made McKee "sound uncaring, unsympathetic or just stupid."

In St. Louis County District Court in Duluth, District Judge Eric Hylden agreed with Laurion, writing, "The statements in this case appear to be nothing more or less than one man's description of shock at the way he and in particular his father were treated by a physician."



Hylden dismissed McKee's lawsuit in April 2011. The Minnesota Court of Appeals, however, disagreed. The court reversed and remanded the dismissal in January 2012, finding that some of Laurion's comments could subject him to liability for defamation. The Minnesota Court of Appeals' full decision is available online at <http://www.lawlibrary.state.mn.us/archive/ctapun/1201/opa111154-012312.pdf>.

Laurion appealed the decision to reverse and remand the case to the Minnesota Supreme Court, which heard arguments on Sept. 4, 2012. The issue in McKee's appeal is whether statements Laurion published describing McKee's treatment of his father are not pure opinion but, rather, factual assertions capable of being proven true or false. This is the standard the United States Supreme Court set forth in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), for what establishes opinion protected by the First Amendment. The Minnesota Supreme Court's summary of the issues in the case is available online at [http://www.mncourts.gov/Documents/0/Public/Calendars/September\\_2012\\_Summary.htm#a111154](http://www.mncourts.gov/Documents/0/Public/Calendars/September_2012_Summary.htm#a111154).

"I argued that the posting to a website is part of the context that colors or shapes what Mr. Laurion was trying to do, and the essential nature of one of these websites is to provide subjective feedback and people get lots of subjective feedback from different perspectives and from different experiences," John Kelly, an attorney with Hanft Fride, P.A., who represented Laurion before the Minnesota Supreme Court, told the *Duluth News Tribune* for a Sept. 5, 2012 story.

"We argued to the court that Mr. Laurion published both on the Internet and to approximately 20 others, including medical organizations, false statements about Dr. McKee that disparaged his professional abilities and hurt his reputation," Tanick, who also represented McKee before the Minnesota Supreme Court, told the *Duluth News Tribune*.

"We asked the court to affirm the decision of the Court of Appeals so that Dr. McKee has the opportunity to present this to a jury and get his day in court."

Lawsuits like McKee's are rare, Eric Goldman, professor at Santa Clara University School of Law told the *Star Tribune*. However, Goldman said "they've been popping up around the country as patient review sites such as [vitals.com](http://vitals.com) and [rateyourdoctor.com](http://rateyourdoctor.com) have flourished." Lawsuits claiming defamation are "kind of the nuclear option,"

**"The lesson here is straightforward: if you are making statements online about another person, a business or service, do not embellish beyond what you can show factually."**

**— Rob Heverly  
Assistant Law Professor,  
Albany Law School of Union University**

Goldman said. "It's the thing that you go to when everything else has failed." Goldman tracks lawsuits healthcare providers file against online reviewers, and told the Reporters Committee for Freedom of the Press (RCFP) for the Fall 2012 issue of *The News Media and The Law* that, of the 28 lawsuits he has tracked, courts dismissed 16 of them, six settled, and the other six are still pending.

In one such suit, an Arizona cosmetic surgeon, Dr. Albert Carlotti III, won a \$12 million verdict against a former patient in February 2012, according to a Feb. 20, 2012 post by the American Medical Association on its website. The patient wrote reviews on numerous websites and created her own website stating Carlotti disfigured her face, was not board-certified, and was being investigated by the state medical board, although no records of such investigations exist; the patient is appealing the judgment.

Online reviews of other businesses and services have resulted in lawsuits alleging defamation around the country, as well. For example, an owner of a Sarasota, Fla. computer graphics company sued a reviewer after the reviewer wrote a negative, one-star review on [Yelp.com](http://Yelp.com), a website that allows anyone to post reviews of a wide range of businesses. The review called the owner "a scam liar and complete weirdo," according to a Dec. 18, 2011 report in the *Sarasota Herald Tribune*. A dentist in

Foster City, Calif. filed a similar suit in Santa Clara County Superior Court in 2008 after a patient's parents posted a negative review on [Yelp.com](http://Yelp.com), according to a Jan. 13, 2009 story in the *San Francisco Chronicle*.

Because online reviewers are subject to defamation lawsuits, Rob Heverly, assistant professor of law at Albany Law School of Union University, wrote a guide for online reviewers on [Madisonian.net](http://Madisonian.net), a blog focused on law, technology, and culture, which features written contributions from many law professors, on April 13, 2010. "The lesson here is straightforward: if you are making statements online about another person, a business or a service, do not embellish beyond what you can show factually," Heverly wrote. "Statements of opinion were, in the past, considered absolutely protected, but the U.S. Supreme Court has clarified that opinion-statements backed by implied facts will be actionable where the facts implied are false." The Minnesota Supreme Court is expected to release its decision in early summer.

**— CASSIE BATCHELDER  
SILHA RESEARCH ASSISTANT**

# New FCC Rule on Disclosure of Political Advertising Follows 2012 Election Spending

**A** new rule from the Federal Communications Commission changed the requirements for how broadcasters must disclose political ads purchased at their stations during the 2012 election cycle. Although the information was already available to the public, the FCC rule now creates an accessible online database of the information. Because a record amount of money was spent on advertising during the 2012 election cycle, journalism experts have advocated for tracking of political spending and diligent fact-checking of the advertising by candidates and outside organizations.

FCC

## **New FCC Rule Requires Local Television Stations to Post Data about Political Ads to Online Database**

The FCC passed a rule in by a 2 to 1 vote on April 27, 2012 requiring the affiliates of the four major networks – ABC, CBS, FOX, and NBC – in the 50 largest markets to post political advertising data for the station to an online database. Those stations needed to begin to post their files to the database on Aug. 2, 2012, according to the July 3, 2012 Federal Register notification of the rule. The rest of the stations in the United States have until July 2014 to comply with the rule.

Stations already had to disclose information about political ads, but only to those who asked to see the records at the station's office in person. The FCC will host the new database on its website where anyone will be able to access it. The stations will have to report a variety of information, including which groups or candidates are paying for ads and how much they are spending, according to an April 27, 2012 story in *The New York Times*.

This rule differs from Federal Election Commission data in many ways, according to a May 4, 2012 story in *Columbia Journalism Review* (CJR). The FCC rule encompasses spending for state races, local races, and national issue ads. According to the rule, the station must upload the data within 48 hours of the ad buy, which requires a much faster turnaround time than the FEC's requirements. Outside groups will have to disclose "chief executive officers or members of the executive committee or of the board of directors," the story said.

Media organizations have varied in their response to the new FCC rule. "By requiring [broadcasters] to make those earnings accessible, the F.C.C. would help the public make better sense of the flood tide of money pouring into politics," *The New York Times* advocated in an editorial on April 27, 2012. The editorial suggested that because broadcasters must charge political advertisers their lowest rates by law, they actually oppose the rule because they do not want businesses that advertise with them to see their lowest rates.

ProPublica, a nonprofit investigative newsroom, published a list of media organizations that lobbied against the FCC rule on April 20, 2012. The list of those opposed to the rule includes many large national media organizations and is available online at <http://www.propublica.org/article/meet-the-media-companies-lobbying-against-transparency>. FCC chairman Julius Genachowski spoke at the National Association of Broadcasters (NAB) convention in April 2012 and said broadcasters opposing the rule were working "against transparency and against journalism," according to an April 27, 2012 story in *The Times*.

The efforts of both broadcasters and GOP leaders on the House Appropriations Committee created some roadblocks for the FCC rule. The House Appropriations Committee originally included language in the 2013 appropriations bills that would eliminate any funding to implement the FCC rule, but dropped that part of the bill on June 20, 2012, according to a *Forbes* report the same day.

Broadcasters fought the rule in court, with NAB filing an appeal on May 21, 2012 asking the U.S. Court of Appeals for the District of Columbia to stay the FCC's enforcement of the rule pending judicial review, according to a May 22, 2012 report in *AdWeek*. This action would have prevented the FCC from forcing stations to comply with the rule until the court could review it. NAB filed this appeal several days after the rule was published in the Federal Register.

The court denied NAB's request for an emergency stay, which allowed the rule to go into effect on Aug. 2, 2012. The NAB's challenge to the rule stands, however, and will be litigated in the future. NAB filed an unopposed motion to defer the date that NAB and the FCC will submit their briefs to the court to Feb. 13, 2013 "to allow NAB to gain experience with

the new regulatory requirements at issue and explore possible alternative means of resolving the issues." This means NAB and the FCC will have to follow the current reporting requirements until the parties appear before the court next year to argue the issues, at which point the court could decide the rule violates the First Amendment. The broadcasters maintain their opposition to the rule, alleging that the rules are arbitrary and capricious and violate the First Amendment's free speech protections as well as exceed the FCC's authority. NAB's motion is available at <http://www.nab.org/documents/filings/OnlinePublicFileMotionDefer091712.pdf>.

"By forcing broadcasters to be the only medium to disclose on the Internet our political advertising rates, the FCC jeopardizes the competitive standing of stations that provide local news, entertainment, sports and life-saving weather information free of charge to tens of millions of Americans daily," the NAB said in a statement to *The Washington Post* for an April 27, 2012 story.

The idea of forcing disclosure aligns with the reasoning of the conservative justices who comprised the majority in the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), according to a Dec. 29, 2011 story in *Columbia Journalism Review*. The U.S. Supreme Court, in that case, held that the First Amendment protects political speech regardless of its source — individual or corporation. Although the justices in that case opened the door for more unlimited spending on campaigns, they emphasized that disclosing the sources of political advertising would make the system work. "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters," Justice Anthony Kennedy wrote in the *Citizens United* decision. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." (For more on the *Citizens United* decision, see "Supreme Court Strikes Down Campaign Finance Regulation for Corporations" in the Winter/Spring 2010 issue of the *Silha Bulletin*.)

### **Disclosure of Funding Sources Crucial for Journalists as More Money Spent on Presidential Election than Ever Before**

The two presidential campaigns for President Barack Obama and Gov. Mitt Romney, political parties, and independent groups spent more than \$1.08 billion on 1,015,615 television commercials between June 1 and Oct. 29, 2012, according to the Associated Press (AP) and the Wesleyan University Media Project.

*The Washington Post* reported American Crossroads and Americans for Prosperity, pro-Romney groups, and Priorities USA Action, a pro-Obama group, took advantage of new campaign finance rules following *Citizens United*. (For a look at current litigation and voter referendums involving *Citizens United*, see “State Limits on Campaign Contributions Remain in Effect for 2012 Election Sessions: Voters Call for Amendment to Overturn *Citizens United*” on page 12 of this issue of the *Bulletin*.)

Many who oppose the *Citizens United* decision argue it opened the floodgates for questionable campaign spending. The FEC does, however, have rules about the relationships between candidates’ campaigns and super PACS (political action committees). The two groups are not supposed to “coordinate” their activities. Coordination, according to the FEC, is “in consultation, cooperation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party.” However, two of the PACS that spent the most money have close ties to the candidates: Priorities USA Action is led by former Obama White House aides and Restore Our Future is run by former Romney advisers, according to a May 15, 2012 report from the AP. Attacks on Gov. Romney’s work at Bain Capital raised questions about whether President Obama’s campaign was working too closely with an outside group, although the FEC never took action, according to the AP. Within 24 hours of one another in May 2012, President Obama’s campaign and the outside group, Priorities USA Action, each released ads related to Gov. Romney’s business practices at Bain Capital, raising questions as to whether the independent group was truly “independent.”

Some argue that because the government has changed so little in this first post-*Citizens United* election, with the same President and the same parties controlling both chambers of Congress, the new spending rules have had little impact, according to a Nov. 7, 2012 story from *Huffington Post*. Others disagree.

“The biggest impact of this money that is dangerous for our democracy was never going to be on the individual elections that occurred, but on the corruption of government decisions that followed,” Fred Wertheimer, president of the campaign finance reform group Democracy 21, told *Huffington Post*. “It would be a big mistake to judge whether we have a corrupt campaign finance system today by the outcome of any of these elections. This is just the beginning.”

### **With Big Money Spent on Political Advertising, Media Experts Say Confirming the Truth of the Ads’ Claims Can Be an Important Role for Journalists**

The influx of election advertising coming from both sides of the political aisle, as well as from special interest groups, coupled with no requirement that ads be truthful, suggests that journalists can play an the important role in fact-checking political advertisements during the campaign season. “Given the barrage of messages and no ‘truth in advertising’ requirement, how is a voter to separate fact from fiction?” asked a Sept. 10, 2012 PBS MediaShift post. “The problem is especially acute if she lives in a swing state, which is where the bulk of advertising dollars lands.”

Applications for smartphones like SuperPACApp and Ad Hawk emerged during the election season to allow any cell phone user to fact-check advertisements. The applications allow the user to press a button while listening to an ad and the application will identify the ad by its sound. Both identify sponsors of ads. SuperPACApp summarizes the claims the ads make and provides links within the application that users can follow to read more about whether the claims made in the ad are misleading or truthful, according to the September 10 PBS MediaShift story.

Nonetheless, journalists still have a role in fact-checking advertising, according to a post by Brendan Nyhan, an assistant professor of government at Dartmouth College, for *Columbia Journalism Review (CJR)* on Nov. 29, 2011. Nyhan contended that misleading advertisements were not difficult to find during the 2012 election cycle. “The problem, however, is that many national reporters — and the state reporters who increasingly emulate them — have been sucked in by the cult of the savvy,” he wrote. “For these journalists, producing meta-level analysis of the *effectiveness* of deception as a campaign tactic is more

important than correcting the factual record for readers.”

Rather than clarifying the misleading aspects of ads, Nyhan argued many journalists are instead interested in discussing the strategy behind the ad, which misses an important benefit for listeners and readers. “A better approach would be for reporters to characterize the accuracy of ads in their own voice and to invoke non-partisan experts like PolitiFact,” Nyhan wrote. “In some cases, it may even be possible to find credible sources on the side of the candidate airing the misleading ad who are willing to state the truth.” Nyhan argued that fact-checking may convince those who create messages to be more truthful in what they present to the public. He used the example of Michael Moore, whose documentaries “Bowling for Columbine” and “Fahrenheit 9/11” included misrepresentations that reporters criticized. Nyhan argued that, as a result of the criticism, Moore was more conscious of the facts in his next documentary, “Sicko.”

Sasha Chavkin, an investigative journalist whose coverage of the 2012 campaign was supported by the Toni Stabile Center for Investigative Journalism at Columbia University’s Graduate School of Journalism, wrote a guide for journalists covering political advertising, published in *CJR* on Sept. 19, 2012. First, he said tracking political ad spending through the FCC’s new online database can prove helpful. Next, he pointed out that tracking spending by both candidates’ campaign and outside groups, including PACs, using FEC data provides insight into who is spending money on the campaign. Several sources provide the data in a useful format, including *The New York Times*, ProPublica’s PAC Track, The Center for Public Integrity, OpenSecrets.org, and the Sunlight Foundation’s Follow the Unlimited Money project. Finally, Chavkin explained that checking the facts that the ads offer is crucial for good reporting. He suggested using an interactive website from *The Daily Beast*, a news reporting and opinion website owned by the same company that owns *Newsweek*, which examined all the ads across the country and weighed claims against the assertions of third party fact checkers. “An ad can be unfair, of course, even though factual,” he wrote, “and there is no substitute for informed and unbiased journalistic judgment.”

— CASSIE BATCHELDER  
SILHA RESEARCH ASSISTANT

# Social Media Policies Threaten Employee Privacy

**A**lthough Federal legislation aimed at regulating the relationship between employers, employees, and social media failed in March 2012, the push for rules protecting employee privacy continues. In December 2012, Michigan became the fourth state, after California, Maryland, and Illinois, to prohibit employers from asking

job applicants for their online profile passwords, and several other states are considering similar legislation. Even Facebook has joined the conversation, working with policymakers and considering legal action to end the password sharing practice.

## **Michigan Is Fourth State to Prohibit Employers from Asking for Social Media Passwords**

New laws seek to protect employee privacy as employers have begun to adopt a practice of requiring social media passwords as part of a job application. According to a March 27, 2012 *Business Week* story, these policies have been mostly limited to police departments and other government entities. For example, *Business Week* reported that state trooper applicants in Virginia are required to sign on to their social media accounts during the interview. However, several states are seeking to stop the practice before it becomes more widespread.

On Dec. 28, 2012, Michigan Gov. Rick Snyder signed a law making it illegal for employers or education institutions to require applicants to disclose their social media passwords. Violators could face up to 93 days in jail and a \$1,000 fine. H.B. 5523. "Cyber security is important to the reinvention of Michigan, and protecting the private Internet accounts of residents is a part of that," Snyder said in a press release the same day. "Potential employees and students should be judged on their skills and abilities, not private online activity." The full text of the law is available online at <http://www.legislature.mi.gov/documents/2011-2012/billenrolled/House/pdf/2012-HNB-5523.pdf>.

Michigan is the fourth state to ban the practice. On Sept. 27, 2012, California Gov. Edmund G. Brown signed a similar law making it illegal for employers to ask for social media passwords, in addition to prohibiting employers from firing or disciplining current employees who refuse to disclose information related

to their online profiles. A.B. 1844. The full text of the law is available online at <http://legiscan.com/gaits/text/665164>.

In August 2012, Illinois also banned the practice. Gov. Pat Quinn signed the law on August 1, citing privacy concerns and the need for the regulations to keep up with advancing technologies. "We're dealing with 21st-century issues," Quinn said, according to an August 1 *Huffing-*

"Employers have no right to ask job applicants for their house keys or to read their diaries — why should they be able to ask them for their Facebook passwords and gain unwarranted access to a trove of private information about what we like, what messages we send to people, or who we are friends with?"

— Charles E. Schumer (D-N.Y.)  
United States Senator

*ton Post* story. "... Privacy is a fundamental right. I believe that and I think we need to fight for that."

The law, effective on Jan. 1, 2013, protects both current employees and prospective hires and provides no exceptions. Even during a required a background check, an employer is prohibited from asking for the applicant's passwords. The law does not prevent employers from looking at the public information on an applicant's profile or from setting workplace policies regarding social media. Pub. Act No. 097-0875. The full text of the bill is available online at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=097-0875>.

Maryland also bans the password sharing practice and 10 more states are considering similar legislation, according to the National Conference of State Legislatures. Although fairly consistent from state to state, the entities covered by the legislation depend on the specific bill. For example, some states are pursuing separate bills banning the practice in the educational setting. Delaware has already passed a bill and on July 20, 2012, Gov. Jack Markell signed it, making it illegal for public or private academic institutions to require or ask for social media passwords from a student or applicant. H.B. 309. New Jersey also banned the practice in institutions of higher education on Dec. 3, 2012. But, states such as Minnesota and Missouri are currently

seeking to regulate the practice only in the context of employment, not education, according to the National Conference of State Legislatures.

The Maryland and Illinois laws make it illegal for employers to ask for, or require, social media passwords from job applicants. In contrast, one bill considered in Minnesota would only prevent an employer from requiring an applicant's

password as a condition of employment, leaving open the possibility that an employer could avoid liability by "requesting" the password rather than "requiring" it. H.B. 2963. However, this may not be sufficient protection to prevent applicants from feeling as though they have to turn over their passwords, as they may find it difficult to say no, even though compliance is technically voluntary. "Especially in times like this when there are not a lot of jobs, that puts a lot of pressure on you," architecture student Pegah Shabehpour told the *Huffington Post* in an August 1 story. "It's hard to resist."

Minnesota is also considering a bill that would prohibit employers from both requesting and requiring the social media passwords. H.B. 2982. "I think people have a reasonable expectation of privacy in their Facebook page and some of their online communications, and it strikes me as unfair for employers to ask to invade that privacy," said Rep. Tina Liebbling (DFL-Rochester).

## **U.S. Senators, Facebook Question Legality of Password Sharing**

On March 26, 2012, two U.S. Senators asked the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice to launch a federal investigation into the legality of employers asking for social media passwords. U.S. Senators Richard Blumenthal (D-Conn.) and Charles E. Schumer (D-N.Y.) called the trend "disturbing" in a March 26 press release, asserting that the practice can be used to gain access to private information including photos, email messages, and biographical data.

"Employers have no right to ask job applicants for their house keys or to

read their diaries — why should they be able to ask them for their Facebook passwords and gain unwarranted access to a trove of private information about what we like, what messages we send to people, or who we are friends with?” Schumer said in a statement for the press release.

The senators contend that requiring applicants to disclose social media passwords may violate the Stored Communication Act and the Computer Fraud and Abuse Act. The Stored Communication Act “prohibits intentional access to electronic information without authorization,” according to a March 26 letter from the senators to Attorney General Eric H. Holder. The Computer Fraud and Abuse Act outlaws “intentional access to a computer without authorization to obtain information,” the letter said. The senators contend that asking for passwords may violate these laws as it could constitute coercion and therefore unauthorized access. 18 U.S.C. § 2701; 18 U.S.C. § 1030(a)(2)(C). The full text of the Stored Communication Act is available online at <http://www.law.cornell.edu/uscode/text/18/part-I/chapter-121>. The full text of the Computer Fraud and Abuse Act is available online at <http://www.law.cornell.edu/uscode/text/18/1030>.

In addition, Blumenthal, Schumer, and Sen. Amy Klobuchar (D-Minn.) are drafting legislation prohibiting employers from requiring login information as part of a job application. However, similar bills have lacked congressional support. A bill prohibiting the password sharing practice, introduced on March 27, 2012, failed to gain support in the House of Representatives and was voted down 184 to 236 on the same day. H.R. 3309. The full text of the bill is available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3309>.

In response to the lack of regulation, Facebook’s Chief Privacy Officer on Policy, Erin Egan, released a statement on March 23, 2012, noting that sharing or soliciting a Facebook password violates Facebook’s Statement of Rights and Responsibilities and promising to take action either by drafting new laws or initiating legal proceedings.

Further, Egan pointed to ways in which the password sharing practice could lead to liability for employers, even without new legislation. For example, viewing an applicant’s personal information could expose employers to claims of discrimination.

“If an employer sees on Facebook that someone is a member of a protected group (e.g. over a certain age, etc.) that

employer may open themselves up to claims of discrimination if they don’t hire that person,” Egan wrote in the March 23 statement.

### ***Employer Social Media Policies Become a Hot Topic for National Labor Relations Board***

On Sept. 7, 2012 the National Labor Relations Board (NLRB) issued its first decision involving an employer’s social media policy. In *Costco Wholesale Corp.*

“If an employer sees on Facebook that someone is a member of a protected group (e.g. over a certain age, etc.) that employer may open themselves up to claims of discrimination if they don’t hire that person.”

— Erin Egan  
Chief Privacy Officer on Policy,  
Facebook

& UFCW Local 371, 358 N.L.R.B. 106 (2012), the board found that several provisions of Costco’s social media policy violated the National Labor Relations Act (NLRA). Employee social media activity is often considered protected “concerted activity” under the Act, as other employees have access to view the information. The violating provisions included prohibiting employees from posting on social media about employee issues, such as sick leave and workers’ compensation, during the time they are on the employer’s property. The policy also unlawfully prohibited employees from posting content that could damage anyone’s reputation.

The decision follows the NLRB’s third memorandum on social media issues for current employees in less than a year, released in June 2012. The report discussed seven employer social media policies reviewed by the NLRB after employees alleged that the policies were overbroad or that an employee had been disciplined for the contents of social media posts. The NLRB found only one policy to be lawful in its entirety. The other six policies contained provisions that the NLRB believes violate the NLRA, according to Lafe Solomon, Acting General Counsel at the NLRB.

The most common problem the NLRB found was that policies tend to be overbroad, encompassing concerted activity that is protected by the NLRA. One such provision placed limits on communication of confidential information. The

NLRB report, dated May 30, 2012, stated that rules that are “ambiguous” and “contain no limiting language” to clarify the rule violate an employee’s rights. Legal restrictions must “clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity.”

Another social media policy the NLRB considered overbroad prescribed the “tone” employees may use and the subject matters they may discuss online. According to the report, one policy said, “Adopt a friendly tone when engaging online. Don’t pick fights.” The NLRB found this provision could be interpreted to include conversations about working conditions or unionism, which are protected

topics under the NLRA.

The policies not only prohibit employees from including certain content on their social media profiles, but some may require employees to post promotional content on their personal accounts. For example, Voice of America, a news broadcaster, asked its journalists to post public relations information and new releases to their personal Twitter accounts, according to *The Washington Post* blog In the Loop. The Sept. 6, 2012 blog post said the employees were reluctant to “parrot” their employer’s views and expressed concern over spamming their followers and compromising their impartiality. A Voice of America spokesman told In The Loop that the policy was adopted to enable journalists to share stories with a wide audience and added that “nobody’s being coerced.”

The NLRB’s September decision sets precedent for future social media cases. However, in a 2011 survey, the board conceded that it has only begun to address the intersection of employment law and social media. As conflicts continue to occur in the workplace and online, the board said it is hard to predict how it will rule on future issue and how those rulings will be viewed by the courts.

— EMILY MAWER  
SILHA RESEARCH ASSISTANT

# Published Photos of Arguably Private Moments Raise Questions About Whether Media Acted Ethically

A recent string of moments captured by photographers has renewed familiar questions about the ethical decision-making process behind the press's decision to publish intimate, sometimes graphic photographs. Media

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organizations are also dealing with accuracy and verification issues arising from the use of photos that have been digitally manipulated or fabricated.

Nude photos of British royalty have implicated privacy concerns abroad. While topless photos of Kate Middleton, Duchess of Cambridge, drew legal action from the royal family, Buckingham Palace took little action beyond discouraging publication when TMZ obtained cell phone pictures revealing Prince Harry's nudity in a Las Vegas hotel room.

Accuracy and verification of photographs came to the forefront of coverage of Hurricane Sandy. The proliferation of Twitter and the need to make decisions quickly led some journalists and news organizations to share photographs that, in the end, were fabricated or did not depict what they were purported to show.

In another set of events, the decision by some domestic publications to print photos of deceased people involved in acts of violence — the victims and the alleged gunman in the Empire State Building shooting, and deceased U.S. Ambassador J. Christopher Stevens — raised questions about when it is appropriate for the press to depict graphic scenes of death.

### ***Buckingham Palace Seeks Legal Sanctions for Photographer and Tabloids Responsible for Topless Kate Middleton Photos***

During a September 2012 vacation to Provence, France, the Duke and Duchess of Cambridge were photographed while spending time on a terrace in a private estate. Among the images captured by an unidentified photographer were some of Kate Middleton topless. The royal couple reportedly did not know the photos were taken until the French magazine, *Closer*, posted pixelated photos of Middleton to its website, and later in print on Sept. 14, 2012.

The Duke and Duchess of Cambridge quickly took action in a French court, filing both a criminal and a civil action

to recover the photographs and prevent any further publication by *Closer*. The *Washington Post* reported on Sept. 17, 2012. The couple's lawyers argued the photos were taken illegally, using a long lens, and that publication of the photos constituted an invasion of their privacy. The couples' concerns expanded, however, when the Italian magazine *Chi* published more photos of Middleton on Sept. 17, 2012.

The Tribunal de Grand Instance, a three-judge panel in Nanterre, ruled in the royals' favor on Sept. 14, 2012 by ordering *Closer's* publisher, Mondadori, to give the couple the digital copies of the photos that were published within 24 hours of the order, according to a Sept. 18, 2012 *Huffington Post* report. The order imposed a daily \$13,100 fine if the publisher did not comply. Furthermore, an injunction prevents *Closer* from reselling the photos or republishing the original photos in print or online. However, the order only covers the 14 photos included in *Closer's* Sept. 14, 2012 print edition and does not affect any of the other publications involved. In its ruling, the French court stated the photos "showed the intimacy of a couple, partially naked on the terrace of a private home, surrounded by a park several hundred meters from a public road..." and that the couple should have been able to "legitimately assume that they [were] protected from passers-by."

Following the order in the civil suit, the focus shifted to identifying the photographer as the royals pursued criminal charges, according to a Sept. 21, 2012 ABC News report. Under French privacy law, the photographer could face a year in prison and up to \$60,000 in fines if the photos are deemed an invasion of privacy. The couple filed the criminal complaint with French prosecutors, who began an investigation to find the photographer.

French photographer Pascal Rostain said he knows the identity of the photographer. "The only thing I can tell you is that he's from south of Dublin and he had red hair, but of course I will never, never, never say his name," he told BBC Radio on Sept. 21, 2012. However, Rostain also told *France Metro* newspaper that the photographer was English and working for *Closer* in the south of France, according to a Sept. 20, 2012 ABC News report.

After the original publication by *Closer* and *Chi*, three more publications, in

Ireland, Denmark, and Sweden, printed the photos, according to the ABC News report. Kim Henningsen, chief editor of *Se & Hoer*, the Denmark celebrity magazine that chose to publish the photos, told the Associated Press (AP) that the magazine was offered 240 pictures and selected between 60 and 70 to purchase. Both *Chi* and *Closer* are published by the former Italian Prime Minister Silvio Berlusconi's publishing house.

Mike O'Kane, former editor of the *Irish Daily Star*, which published reproductions of the photos, told the BBC for a Sept. 15, 2012 report that the paper did not include the photos in its edition sold in Northern Ireland, which is part of the United Kingdom. The *Guardian* reported on Sept. 18, 2012 that O'Kane was suspended by co-owner Richard Desmond pending an investigation into why the *Irish Daily Star* printed the photos, and on Nov. 25, 2012, reported that O'Kane resigned. Desmond, whose group, Northern & Shell, owns the *Daily Express* and *Daily Star* in the UK, in addition to half of the *Irish Daily Star*, threatened to take "immediate steps" to shut the *Irish Daily Star* down, the story said. Independent News and Media, who owns the other half of the paper, worked with Desmond, and the two decided to complete a more thorough inquiry to "find out what led to the decision to publish without either owner being informed" rather than immediately closing the paper down. According to the *Guardian* report, Irish Minister for Justice, Equality and Defense Alan Shatter decided to revisit new privacy laws first introduced in 2006 in the wake of the incident. Shatter said the *Irish Daily Star's* decision to publish the photos was based on "perceived financial gain" rather than "principled freedom of express."

Notably, no British publications have published the photos to date. The staff of the *Daily Mail*, a British tabloid, published a statement on Sept. 14, 2012 arguing that *Closer* and the photographer "are guilty of an indefensible intrusion of privacy." Former *News of the World* Editor Neil Wallis, arrested as a part of the paper's phone hacking scandal last year, told the BBC, "They won't get published in [the UK], and if I was still an editor I would not be publishing them." *TIME* magazine reported on Sept. 14, 2012 that the British press has been particularly cautious with its handling of private matters in the wake of the phone hacking

scandal, which uncovered widespread intrusion into the private lives of numerous celebrities, politicians, and even crime victims. (For more on the British phone hacking scandal, see “Not Just a ‘Rogue Reporter’: ‘Phone Hacking’ Scandal Spreads Far and Wide” in the Summer 2011 issue of the *Silha Bulletin*.) After the phone hacking scandal, Lord Justice Brian Leveson launched an investigation into the ethical practices of the British press, which some argue has caused the press to be more hesitant to publish material it might have prior to the Leveson Inquiry for fear of unfavorable recommendations and findings. (For more on the report resulting from the Leveson Inquiry see “Leveson Inquiry Report Calls for New System of Press Regulation in United Kingdom” on page 1 of this issue of the *Silha Bulletin*, and for past coverage, see “Scandals, Inquiries, and Reform Might Leave U.K. Press Freedom Worse for the Wear” in the Summer 2012 issue of the *Silha Bulletin*.)

Will Gore, deputy managing editor of the *Independent* and former director of external and public affairs at Britain’s Press Complaints Commission (PCC), wrote in a Sept. 21, 2012 column in the *Independent* that the “saga of the Kate Middleton pictures” suggested that the PCC does a better job regulating the British press than the Leveson Inquiry gives it credit for. The PCC, the self-regulating body for the UK press, has the ability to hear complaints about the press and issue sanctions to media entities that violate its code. Gore argued that the PCC has been effective in preventing publication of the pictures of Middleton because the PCC Code and its case law have encouraged the British media to adhere to more ethical practices over the last several years. Gore noted that, although France, Italy, and Denmark, unlike the UK, have stringent privacy laws in place, these laws and the threat of damages awards have not prevented the publication of private information that can increase circulation and sell many newspapers.

France’s privacy law makes it a criminal offense to print private information about a person without that person’s consent. Some have raised questions about what level of privacy a figure as public as the Duchess of Cambridge should expect. French lawyer Anne Pigeon-Bormans told *TIME* that French courts consider “the victim’s behavior, when the person is flaunting themselves on camera. Kate Middleton will get damages because she’s not behaving in this way.” *The Daily Mail* accused France, despite

its tough privacy laws, of having the worst paparazzi “on the planet and the French media routinely publish intimate photographs of celebrities in private situations,” in a September 14 commentary. In addition, a September 14 BBC column pointed out that although French law imposes a fine for invasions of privacy, if the monetary sales of the magazine or paper would be greater than the potential fine, there is no incentive not to publish. Media lawyer Mark Stephens, the 2011 *Silha* Lecturer, told Bloomberg for a Sept. 17, 2012 story that the privacy laws in France and the UK are not strong enough to discourage invasions of privacy. “Post-publication punishments are clearly an insufficient deterrent — it’s a major problem at the moment in France and the U.K.,” Stephens said. (For more on European privacy law development regarding public figures, see “British Media Law Developments Positive for Press” in the Spring 2012 issue of the *Silha Bulletin*.)

#### ***Cell Phone Photographer Shares Photos of Nude Prince Harry from Las Vegas Party Suite, Murdoch’s Sun is the Only British Paper to Publish***

The U.S. tabloid blog TMZ posted online pictures of Prince Harry nude and reportedly playing strip billiards in a Las Vegas hotel on Aug. 21, 2012. The pictures were reportedly taken by a woman with her cell phone who was in the room for the party.

On Aug. 22, 2012, Prince Harry’s representatives issued an advisory notice through the Press Complaints Commission (PCC) asking British publications to abstain from printing the pictures, according to a PCC Sept. 6, 2012 press release. The PCC stated that it was in talks with Prince Harry’s representatives about whether Prince Harry would file a formal complaint should the photos be published by any British newspapers.

The *Sun*, a British tabloid owned by Rupert Murdoch, published the pictures on Aug. 24, 2012 despite the official request. *The Washington Post* reported that, prior to these pictures of Prince Harry, the British media seemed to be “entering an era of caution” because of the phone hacking scandal and the resulting Leveson Inquiry in an Aug. 24, 2012 story. The PCC’s September 6 press release said that the commission received approximately 3,800 complaints about the photos.

The *Sun* justified its decision to publish the photos in an Aug. 24, 2012 story. The headline accompanying the pho-

tos was, “Heir it is! Pic of naked Harry you’ve already seen on the internet.” The *Sun* wrote that the photos were readily available online and the British media was reporting about the photos, even if they chose not to publish them. The tabloid contended there was a strong public interest in discussing the actions of “the man who is third in line to the throne and increasingly taking on official duties,” and that the prince represents “Britain around the world.” Additionally, the *Sun* noted the pictures raise questions about the quality of his security and whether the pictures would impact his positions with the British army.

The *Sun* argued further that by his own actions, Prince Harry was not “jealously guarding his privacy” because he was “in Vegas, the party capital of a country with strong freedom-of-speech laws, frolicking in the pool before inviting strangers to his hotel room for a game of strip billiards.” Finally, the *Sun* stated that publishing the pictures was in keeping with prior PCC precedent and cited a case in which the PCC ruled in favor of a “magazine which published pictures already widely seen online.” In that case the PCC said that it needed to consider “the extent to which material is already in the public domain.” Here, the pictures were initially posted on TMZ.com and quickly spread across the Internet. The *Sun* also acknowledged that it “likes Harry” and emphasized that the decision to publish was not meant to question his partying activity but rather to bring to light the potential lack of judgment demonstrated by Harry and his security’s decision to allow the pictures to be taken. This position was echoed by many, as London’s mayor, Boris Johnson, told the BBC that the “real scandal would be if you went all the way to Las Vegas and you didn’t misbehave in some trivial way” on Aug. 24, 2012.

Distinguishing the *Sun*’s decision to publish the pictures of Prince Harry but not the Duchess of Cambridge, managing editor David Dinsmore said the pictures of Middleton were a serious invasion of privacy, whereas the pictures of Prince Harry were not taken in a private place and were a matter of public interest, according to a Sept. 17, 2012 Bloomberg report.

Prince Harry and his representatives decided not to pursue a complaint with the PCC, according to a Sept. 28, 2012 story from the BBC. His spokeswoman maintained that “a hotel room is a private space where its occupants would have a reasonable expectation of privacy.” She

**Photos, continued on page 24**

**Photos**, continued from page 23

said Prince Harry and his advisors decided that pursuing a complaint with the PCC against the *Sun* would distract from Prince Harry's impending deployment to Afghanistan.

The Las Vegas Convention and Visitors Authority took advantage of the media buzz surrounding the photos with a full-page advertisement in *USA Today*, according to an Aug. 24, 2012 ABC News report. The advertisement plays off the familiar Las Vegas slogan, "What Happens in Vegas Stays in Vegas" by shaming those who "traded in their pledge to their Las Vegas brethren" by sharing the photos of Prince Harry. The advertisement calls on "the defenders of what happens in Vegas staying in its rightful place — in Vegas" to shun "these exploiters of Prince Harry."

Reactions to the *Sun*'s decision to publish the photos have varied. Several sources expressed disapproval of their publication. John Prescott, former deputy minister and a victim of the phone hacking scandal, tweeted about the publication, saying, "This isn't in the public interest. It's in Murdoch's self-interest." In an Aug. 24, 2012 story, media lawyer Mark Stephens told the *Guardian*, "There is no public interest in publishing these pictures, even the *Sun* can't come up with a public interest in publishing these pictures, and the fact that they are available in foreign media doesn't make English law any less applicable. They have broken the law cynically, and obviously with a view to obtaining publicity."

On the other hand, Murdoch's daughter, Elisabeth Murdoch, contended it would be "sad if newspaper could not print something that was so freely available on the internet," according to the August 24 story in the *Guardian*. However, a Conservative member of the House of Commons, Louise Mensch, told the BBC that "the Press Complaints Commission totally overstepped their bounds by going to the U.K. press . . . and telling them not to publish these photographs" on Aug. 24, 2012. She said the press should not be forced to be so afraid of negative consequences from the Leveson Inquiry "that they refuse to print things that are in the public interest." The *Guardian* commented on the *Sun*'s decision on Aug. 24, 2012, saying the public interest defense "is pretty thin, but it isn't entirely without merit either." The *Guardian* acknowledged that "the central point in the *Sun*'s favour" is that "print is merely trying to reflect the reality of the Internet." Neil Wallis, who said he would not have published the picture

of the Duchess, said he was concerned about the Leveson Inquiry's impact on the media's identification of stories that serve the public interest with regard to the Prince Harry photos in an Aug. 22, 2012 *Huffington Post* commentary. Wallis called inquiry "a disgraceful affront to free speech" and said "it's His Lordship's Voice that speaks loudest in Britain's newsrooms today."

Chris Brauer, co-director of the Centre

"There is no public interest in publishing these pictures, even the *Sun* can't come up with a public interest in publishing these pictures, and the fact that they are available in foreign media doesn't make English law any less applicable. They have broken the law cynically, and obviously with a view to obtaining publicity."

— Mark Stephens  
Media Attorney, Finers Stephens Innocent

for Creative and Social Technologies at Goldsmiths, University of London, discussed the public interest in publishing the Prince Harry pictures in a Sept. 11, 2012 *Huffington Post* blog post. He noted that Twitter's trending topics in the UK demonstrated British citizens were "deeply engaged" in the story and three of the top five Google searches about Prince Harry "included TMZ." Brauer suggested this meant anyone who hoped to see the pictures could simply go online and find them. The only way to prevent this, Brauer said, would be to censor the Internet — and that even preventing the UK's media from publishing photos might qualify as the PCC "exercising anti-competitive practices and forcing UK news consumers to access their media from competitors abroad." Brauer said in the future "publishers will need to make these ethical decisions on public interest informed at least partially by the interest of the public when the content is readily available abroad."

#### ***Breaking News Coverage During Hurricane Sandy Results in Some News Organizations Sharing Fabricated, Misleading Photos***

As Hurricane Sandy approached the East Coast of the United States in late October 2012, Americans increasingly turned to social media for information. Twitter feeds were able to provide

people with quicker breaking news updates during the storm and its aftermath than many traditional sources of media because of the speed at which Twitter posts could be made and the power outages that affected many outlets, Mediabistro, a website with blogs about social media and journalism, reported in an Oct. 30, 2012 post. More than 7.1 million tweets about the storm were sent in the 24 hours before it hit,

according to an Oct. 29, 2012 ABC News report. Kevin Systrom, chief executive officer of Instagram, a service that allows users to post photos to social media, told *The New York Times* that users were posting 10 pictures per second related to Hurricane Sandy for an Oct. 29, 2012 blog post. Mixed in with all these online postings

were a number of photographs that were proven to be fabricated, misleading, or inaccurate.

*The Atlantic* tackled the issue of "fake" photographs with an ongoing post it called a "photograph verification service...or a pictorial investigation bureau" that it started on Oct. 29, 2012. Senior Editor Alexis C. Madrigal identified three types of falsified photographs: "1) Real photos that were taken long ago, but that pranksters reintroduce as images of Sandy, 2) Photoshopped images that are straight up fake, and 3) The combination of the first two: old, Photoshopped pictures being trotted out again." Average Twitter users and veteran journalists alike were fooled by and shared falsified photos.

One image, both compelling and false, was circulated broadly: an image depicting sentinels at the Tomb of the Unknowns at Arlington National Cemetery standing guard through a torrential downpour, reportedly during Hurricane Sandy. The photographer, Karin Markert, told journalism think tank Poynter that she took the photo in September 2012, not during the hurricane, according to an Oct. 29, 2012 post. The picture was "liked" more than 70,000 times and shared 90,000 on Facebook, according to *The Huffington Post* in an October 29 report. National Public Radio (NPR), *The Washington Post*, *The Daily Beast*, and



other news organizations also shared the photo, according to Poynter. The Tomb of the Unknowns photo was not the only false photo to make the rounds amongst media organizations. Others depicted incredible storm clouds actually taken from movies, sharks edited into photos of flooded streets, and images that originated with other natural disasters.

Craig Silverman, adjunct faculty at the Poynter Institute and founder of Regret the Error, a blog that covers media errors and corrections for Poynter, wrote a guide to assist journalists in determining whether photos are real in an Oct. 29, 2012 post for Poynter. “Big weather brings an onslaught of fake images,” Silverman wrote. The first step, he wrote, is for journalists to refrain from merely reposting or retweeting any images they see and to verify them before spreading them further. “Events like Sandy are ideal for hoaxes, and they love nothing more than getting the press to share their handiwork,” Silverman wrote.

#### ***Graphic Photos of Deceased Ambassador to Libya and Empire State Building Shooting Raise Questions About When Showing Scenes of Death Is Appropriate***

U.S. Ambassador to Libya J. Christopher Stevens, working at the American mission in Benghazi, Libya, was attacked by militants on Sept. 11, 2012 and declared deceased at a local hospital the following day, according to a *New York Times* report. Ambassador Stevens died as a result of smoke inhalation during the attack and ensuing fire. Initial reports linked the attack to the wave of angry reactions across the Middle East in response to a video posted online in the United States about the Prophet Muhammed. However, the Obama administration is now investigating the attack as a terrorist act committed by extremists with ties to al-Qaeda, according to a Oct. 3, 2012 Bloomberg report.

Following the attack, “a freelance photographer took pictures of Libyans apparently carrying Mr. Stevens’s ash-covered body out of the scene that were distributed worldwide by Agence France-Presse,” *The New York Times* reported on Sept. 12, 2012. *The Times* posted the graphic photo to its website, “drawing an official complaint from the State Department, which requested that it be removed,” according to a Sept. 13, 2012 *Huffington Post* story. *The Times* refused to pull the photo from its website, although it did not run the photo on its print edition’s front page. Responding to the State Department’s request, Associate

Managing Editor for Standards Philip B. Corbett wrote in *The Times* on Sept. 12, 2012, “Such decisions are never easy, and this one was harder than most. But this chaotic and violent event was extremely significant as a news story, and we believe this photo helps to convey that situation to *Times* readers in a powerful way. On that basis, we think the photo was newsworthy and important to our coverage. We did, however, try to avoid presenting the picture in a sensational or insensitive way.”

The *Los Angeles Times* also published

“*The New York Times* photo, while it is incredibly compelling and disturbing, what makes it graphic is the blood, the color, but blood is an inextricable part of a mortal wound.”

— Kenny Irby  
Senior Faculty for Visual and Diversity Programs,  
Poynter Institute

the graphic photo depicting Libyans’ attempts to bring Ambassador Stevens to the hospital on its Sept. 13, 2012 front page. In a “Reader’s Rep” piece on the same day, the newspaper responded to questions and comments from readers about the decision to feature the graphic photo so prominently. “Some readers called the photo graphic, unwarranted, inappropriate, disgraceful, gratuitous and insensitive,” the commentary said. Managing Editor Marc Duvoisin explained the newspaper’s decision to publish the photo: “What makes the photograph disturbing to some readers is also what makes it newsworthy. An assault on a U.S. diplomatic mission, resulting in the death of an ambassador, is a very rare and significant event. . . . *Times* editors, after careful consideration and discussion, selected the least grisly of the available images. Our job is to present an unvarnished picture of the news, without carelessly offending our readers.”

The media’s use of graphic images was also debated following an August 2012 shooting outside of the Empire State Building in New York City. Jeffrey Johnson, who had been laid off from a nearby shop in 2011, came back and shot former colleague, Steven Ercolino, on Aug. 24, 2012, according to the AP. Johnson was then shot and killed by police officers, whose rounds injured nine bystanders. Other bystanders captured images of the

victims as well as the deceased shooter. Reuters and the *New York Daily News* featured these pictures of dead bodies on their homepages, according to an Aug. 24, 2012 Poynter report. *The New York Times* placed a birds-eye image depicting a victim, surrounded by vibrant, flowing blood, on its homepage.

Commentators expressed a variety of views about the decision to show the graphic photos. Kenny Irby, Poynter’s senior faculty for visual journalism and diversity programs, thought the organizations handled the graphic photos well. “*The New York Times* photo, while it is incredibly compelling and disturbing, what makes it graphic is the blood, the color, but blood is an inextricable part of a mortal wound,” he said in an Aug. 24, 2012 story. Irby also noted the photos’ angles and pixilation made identi-

fying those portrayed in them difficult to identify, showing sensitivity to the victims’ families.

According to an email to Poynter’s Andrew Beaujon from *New York Times* spokesperson Eileen Murphy on Aug. 24, 2012, not all news consumers approved of the photo’s inclusion on the homepage. “It is an extremely graphic image and we understand why many people found it jarring,” said Murphy. “Our editorial judgment is that it is a newsworthy photograph that shows the result and impact of a public act of violence.”

In an Aug. 27, 2012 piece, Poynter’s Al Tompkins wrote about the decision to use graphic photos to portray important events. He recommends that news organizations ask several questions when deciding whether to run graphic photos: What is the real journalistic value of the photographs? What do they prove and why are they news? Do they dispel or affirm information the public had prior to seeing the images? What is the tone and degree of the usage? How will you warn the audience? How will you explain your decisions to the public? Tompkins said answering these questions will provide a guide for media organizations handling images that are graphic and potentially offensive in nature.

— CASSIE BATCHELDER  
SILHA RESEARCH ASSISTANT

# Silha Lecture Features Experts on the Ethics and Craft of Writing Restaurant Reviews

An outing to an upscale New York seafood restaurant awakened Lynne Rossetto Kasper, moderator of the 27th annual Silha Lecture, author and host of American Public Media's "The Splendid Table," to changes in the world of restaurant

## SILHA CENTER EVENTS

reviews. A couple sitting at a nearby table realized their "fresh" fish had been frozen and complained to the waiter. "Then the waiter made a huge mistake," she said. "He debated with them." Rossetto Kasper watched the diner's response: in the midst of the incident, one of the customers began texting on his cell phone. Assuming the customer was posting a negative online review of the newly-opened restaurant, Rossetto Kasper thought, "This is the new world of restaurant reviewing. I wonder how long this place is going to be open."

The ethics of how restaurant critics approach their work, especially given the explosion of popular online sites such as Yelp and Urbanspoon, were the focus of the Oct. 25, 2012 event, titled "A Question of Taste: The Ethics and Craft of Restaurant Reviewing." The panel included Rick Nelson, restaurant critic and food writer for the *Minneapolis Star Tribune*, and Michael Stern, who, along with his writing partner Jane Stern, created the "Roadfood" empire, which celebrates regional dining around the country.

Rossetto Kasper, Stern, and Nelson contemplated the "new world" of online reviews posted by "ordinary" patrons. "Part of me thinks that the more people talking, tweeting, blogging with a burning interest in my subject, the better," Nelson said. Nelson and Stern agreed, however, that the lack of information about the reviewers' background and potential motives may mislead readers. Nelson said that the reviewer may have an underlying desire to destroy or support a given restaurant. "You have to do a lot of reading between the lines and take things with lots of grains of salt," Stern said.

The panel discussed a wide range of ethical considerations restaurant reviewers face. Rossetto Kasper distinguished between the work of Nelson and Stern. As a critic based in

a local community, Nelson's "review [of a restaurant] affects that business and our choices." Stern, on the other hand, is expected to find unusual off-the-beaten-path spots and travels constantly. His reviews are not based in one community, so the expectations are different. Nelson said he relies on the Food Critics' Guidelines, an aspirational code developed by the Association of Food Journalists. The

"It is the hospitality business. If that isn't present, no matter how good the food is, I probably wouldn't recommend it."

— Michael Stern,  
Food Critic/Author,  
Roadfood.com

Guidelines note that food journalists are still journalists and should follow the general ethics of the profession, and also provide a number of suggestions specific to restaurant reviewers. For example, they state that reviewers should maintain anonymity and make multiple visits to a restaurant to better gauge the restaurant's overall performance. Also, they recommend that the reviewer should sample a wide variety of menu items and the reviewer's employer should pay for the meal to ensure the reviewer never accepts a free meal. Critics should also wait at least a month after the restaurant opens to the public to visit to give the restaurant an opportunity to establish itself. The guidelines also address negative reviews, noting that a negative review should be "accurate and fair." If a reviewer decides he will write negatively about a restaurant, he must be sure to adhere to the rest of the Guidelines and keep in mind that he is "dealing with people's livelihoods." The Food Critics' Guidelines are available online at <http://www.afjonline.com/FoodCriticsGuidelines.cfm>.

Nelson and Stern highlighted different approaches to the craft. Although Stern's photograph is featured on his website and he and Jane Stern sometimes discuss their work with chefs, Nelson does all he can to maintain anonymity to avoid receiving special treatment at restaurants. At the Silha

Lecture, he sat hidden behind an umbrella with his back to the 350-person overflow crowd in the University of Minnesota's Cowles Auditorium. With the possibility of restaurateurs and chefs attending the event, Nelson wanted to keep his identity a secret.

"There is nothing worse [for a critic] than being recognized in a restaurant," Nelson said. Because he is based in Minneapolis and regularly reviews

restaurants in the community, Nelson said it is important that he has dining experiences similar to those of his readers. He makes multiple visits at various times of the day, sometimes alone; he also makes reservations and

uses a credit card in other names. Stern, by contrast, is often only able to make one visit while on the road. Stern commented that, when chefs recognize him, he can tell that "they fussed and they fretted" and "the meal just wasn't as good" as if it had been simply made.

Stern and Nelson each attempt to taste as broad a range of menu items as possible. Stern said this would be easier to do if he and Jane Stern could make multiple visits to restaurants. Because they cannot, "Jane carries a really big purse and a lot of plastic bags," he said, drawing a laugh from the audience. He explained that they often visit "lovely mom-and-pop places" where they would likely "trouble somebody" if they did not finish their meal, so they often take the uneaten food with them.

A particular concern Stern faces is paying for meals. Although Nelson has a budget provided by the newspaper, Stern is more readily recognized and often receives offers for free meals. Stern said this can be difficult because he does not want to appear rude by not accepting the meal, but he refuses to accept free meals to avoid feeling obligated to review the restaurant favorably.

The panel also discussed the practice of waiting 30 days before visiting a new restaurant. But Rossetto Kasper questioned the practice, suggesting that if reviewers do not visit in the first month, customers face a dilemma.

Nelson said food critics do not review new restaurants just after they have opened “because it is a big deal to be in the newspaper, and a restaurant usually gets only once chance to be reviewed.” He noted that restaurants often go through drastic changes in their first month. “I want to be as accurate as possible,” Nelson said. “I want to capture what I think is going to happen” when diners visit the restaurant in the future. But “if I’m a customer, do I stay away?” Rossetto Kasper asked. “I do not go [to a new restaurant] as a benevolent customer.”

Negative reviews were another topic of conversation. Rossetto Kasper advocated for more negative reviews, saying, “I want to know where not to go... We are owed as a dining public” to know which restaurants critics consider poor. When asked about negative reviews the panelists have written, Nelson cited a review of a now-closed Italian restaurant in a suburb of the Twin Cities he wrote years ago. He said the restaurant was “comically bad” and he wrote a “really, really negative review.” Although he tossed and turned with worry the night before the newspaper published the review, Nelson received almost entirely supportive emails in response, agreeing that the restaurant deserved the negative review. He said he felt relieved to know he “got it right.” Stern said negative reviews are almost non-existent in the Roadfood empire as the team’s mission is to find noteworthy spots to eat rather than to caution customers about where not to eat — his mission is simply not based on writing negative reviews.

The topic of the Silha Lecture proved timely as, less than a month later, *The New York Times* published a highly negative review of a new restaurant in Times Square. Guy Fieri, host of Food Network’s “Diners, Drive-in, and Dives,” opened “Guy’s American Kitchen & Bar,” and the review appeared in *The Times* on Nov. 13, 2012. The restaurant critic, Pete Wells, framed the review in a series of sarcastic rhetorical questions suggesting the restaurant’s food, ambience, and service are very poor. Wells told the Poynter Institute’s Mallory Jean Tenore for a Nov. 14, 2012 post that he wrote the piece as he did because it gave him the chance to explore a number of issues he observed in four visits to the restaurant. The review has been both criticized for being too harsh and lauded for its honesty. Natalie Morales, news anchor on the NBC’s “Today” show said, “Sometimes critics go too far.” *TIME*’s television critic, James Poniewozik, wrote that while some may call the review “cruel,” Wells was justified in advocating for higher quality, American-style food in a Nov. 14, 2012 commentary. Many online commentators, bloggers, and professional journalists have expressed appreciation for the review’s humor and candor. Fieri has stood up for his restaurant, claiming Wells had an “agenda” in writing the review in an appearance on “Today.” “Great way to make a name for yourself, go after a celebrity chef that’s not a New Yorker,” Fieri told “Today’s” Savannah Guthrie.

Negative or not, for both Nelson and Stern, their reviews are rooted in

servicing their audiences. Nelson said his goal is to provide accurate information for his audience and tell an entertaining story. He said food is not always the most important part of the review, adding, “People go to restaurants for all kinds of reasons. Sometimes the food is the very last reason. I try to have as many kinds of experiences as I can in the restaurant.” Both critics agreed that hospitality is a crucial component of any restaurant. Nelson said he views restaurants as an extension of the owner’s home. “Hopefully [the owner is] treating everyone who comes into their commercial home like a long-lost friend,” Nelson said. “Lack of hospitality, or hostility,” is the worst thing Stern said he can experience in a restaurant. “It is the hospitality business. If that isn’t present, no matter how good the food is, I probably wouldn’t recommend it,” he added. Stern’s goal with his reviews is to highlight why a reader would want to seek out a restaurant, adding, “Food is all about what it means to people.”

Video and audio of the full lecture are available on the Silha Center website at [silha.umn.edu](http://silha.umn.edu). Silha Center activities, including the annual lecture, are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

— CASSIE BATCHELDER  
SILHA RESEARCH ASSISTANT



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Silha Center for the Study of Media Ethics and Law  
School of Journalism and Mass Communication  
University of Minnesota  
111 Murphy Hall  
206 Church Street SE  
Minneapolis, MN 55455  
(612) 625-3421

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